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D I G E S T

OF THE

LAW OF ACTIONS AND TRIALS

AT

Nisi Prius.

By ISAAC 'ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

THE THIRD EDITION, CORRECTED,
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CHAPTER IX.

The Action of Ejectment.

EJECTMENT is an action whereby a term of years is recovered.

Ejectment is either on the title, or for non-payment of rent.

1. When in this action the right to lands and tenements is tried, it is called *ejectment on the title*, and is done in this manner:

He who claims the land against him who is in possession, is supposed to make a lease for years to some fictitious person, who is then supposed to be in possession until he is ejected either by the tenant in possession or by some fictitious person, who is called the casual ejector; against him the fictitious lessee brings his action for the expulsion, and he (the casual ejector) gives notice to the tenant in possession to defend his title to the lands, which thereby comes in issue; and if found for the plaintiff, he is put into possession.

2. *Ejectment for non-payment of rent* was given by statute 4 G. 2. c. 28. The forms of proceeding are the same as in case of ejectment on the title.

In treating of the Action of Ejectment, I shall consider it, 1st, With reference to the *Things* for which it lies. 2d, With reference to the *Person*. 3d, Of serving the Ejectment. 4th, The *Pleadings*. 5th, The *Evidence*. 6th, The *Verdict*, and other subsequent Proceedings.

1st, OF EJECTMENT, WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

1. "An ejectment will properly lie for nothing of which Bull. N. P. 99. the sheriff cannot deliver possession under an execution."

Therefore incorporeal hereditaments, things lying merely in grant, *quæ nec tangi nec videri possunt*, are not properly objects of this action.

But to this rule there are exceptions.

[428]

1. For an ejectment will lie for *common appendant or appurtenant*, but not for *common pur cause de vicinage*; for the sheriff by giving possession of the land gives possession of the common: but *common pur cause de vicinage* is a mere permission.

Newman v. Holdmyast, 1 Stra. 54.

EJECTMENT.

Priest v. Wood.
Cro. Car. 301.

2. It is enacted by statute 32 H. 8. c. 7. §. 7. "That where
" any person shall have an estate of inheritance in *tithes* or
" *other spiritual profits*, which shall be in lay-hands, he may
" have his remedy in the temporal courts ;" which has been
resolved to be, that he may maintain an ejectment or other
action for them.

Camell v.
Clavering.
2 Lord Raym.
789.

This statute confined the cases of ejectment for tithes to
lay-hands, but it has since been extended to allow ejectments
for tithes where they are in the hands of the clergy, and to
lie for small tithes.

Goodtitle ex
dim. Chester v.
Alker & Elms.
1 Burr. 123.

2. Ejectment will lie for land, which is part of the *king's
highway*, by the owner of the soil ; for appropriating it to
the use of the public is not a desertion of the property. But
it shall be recovered, *subject to the easement*.

Norris v. Isham.
Hetley 80.

3. An ejectment for a *manor* generally is bad, without
expressing the number of acres for services belonging to a
manor ; for which no ejectment can lie.

Challoner v.
Thomas.
Yelv. 143.
Cro. Car. 492.
S. P.

4. An ejectment for a *watercourse*, or *stream of water*, is
ill, for it is fluctuating, and of which no possession can be
given ; it should be of *so much land covered with water*.

Sullivan v.
Seagrave.
Stra. 695.

5. And an ejectment need not be for an entire thing, as
it will lie for the *third part of an house*.

Hollingsworth
v. Brewster.
Salk. 256.

6. Ejectment will lie for a *church* ; but it must be de-
manded by the name of a messuage. In this case it is said
that the curate may have a rule to defend *quoad* a right of
entry to perform divine service ; but that case has been over-
ruled.

2dly, OF EJECTMENT FOR NON-PAYMENT OF RENT.

[429]

Ejectment for non-payment of rent was given by statute
4 Geo. 2. c. 2. by which it is enacted, " That when half a
" year's rent is in arrear, and no sufficient distress to be
" had, and the landlord hath by law a right of re-entry, he
" may, without any formal demand, serve a declaration in
" ejectment, or affix it to some notorious place on the house
" or lands ; and in case of judgment against the casual
" ejector, or nonsuit for not confessing lease, entry, and
" ouster, the plaintiff shall have judgment" under the follow-
ing provisoes: 1. " There must be an affidavit or proof at
" the trial that there was half a year's rent in arrear, and no
" sufficient distress to be had, and that the lessor had a right
" of entry. 2. Lessee, or any one claiming under him, may,
" within six months after judgment and execution, redeem
" the premises by paying the rent and costs, or may bring
" a bill in equity, otherwise he will be barred for ever ;
" except as to bringing a writ of error to reverse the judg-
" ment

" ment in ejectment. 3. If the premises had been mort-
 " gaged by the lessee, and the mortgagee not been in pos-
 " session, the mortgagee may, within six calendar months
 " after execution, redeem the premises on paying the debt
 " and costs. 4. And if within the six calendar months the
 " defendant files his bill in equity, he shall not have or con-
 " tinue an injunction, unless within forty days after answer
 " to his bill he brings into court such sum as the plaintiff
 " or lessor swears to be due, subject to the disposal of the
 " court. And if the tenant shall have a decree on his bill,
 " the lessor shall be accountable only for what he really and
 " *bond fide* received out of the premises while in his posses-
 " sion, and if less than the rent, the lessee shall pay the re-
 " mainder before he is put into possession. 5. But if the
 " defendant has a verdict, or the plaintiff be nonsuited, ex-
 " cept for not confessing lease, entry, and ouster, in such
 " case the defendant shall recover his full costs. 6. But the
 " tenant may at any time before the trial pay into court the
 " rent-arrear and costs, and thereon proceedings shall be
 " stayed."

Under this statute it has been held,

1. " That where there has been a recovery in ejectment
 " under this statute, that after possession having been long
 " acquiesced in, the Court will presume all the forms which
 " the statute requires to have been rightly performed."

For where in ejectment the lessor of the plaintiff had been
 lessee of the premises in question, and twenty years before
 they had been recovered against him by the now defendant,
 who was lessor; this ejectment was brought on the ground
 that the proceedings in the former ejectment had been under
 stat. 4 Geo. 2. c. 28., and that the judgment there given was
 by default, and that there did not appear that there had been
 an affidavit then made by the lessor of the plaintiff that half
 a year's rent was then in arrear, and no sufficient distress
 to be had: but the Court held, That the proceedings being
 stated to be under that statute which requires an affidavit to
 that purpose, and the possession having been so long acqui-
 esced in, they would presume all the proceedings to have
 been regular.

Doe ex adm.
 Hitchings & alt.
 v. Lewis.
 1 Burr. 614.

* 2. It was formerly the practice in case of ejectments
 brought on an entry for non-payment of rent, to stay all
 proceedings on bringing the rent due into court: and this
 was done before the making of the statute, and after judg-
 ment.

Downes v.
 Turner.
 Salk. 597.
 * [430]

" And it still may be done; for the case of stay of pro-
 " ceedings on paying the rent and costs, seems not to be
 " confined to proceedings under the statute."

Pure ex dim.
Withers v.
Sturdy.
Hil. 1792.
Bull. N. P. 97.

For where in ejectment by a landlord the tenant moved to stay proceedings upon payment of the rent-arrear and costs; on a rule to shew cause, it was insisted for the plaintiff that the case was not within the act, for that it was not an ejectment founded singly on the act, but that it was brought likewise on a clause of re-entry in the lease *for not repairing*, and the lease was produced in court. But the rule was made absolute, with liberty for the plaintiff to proceed on any other title.

3. "Under the statute the proceedings will be stayed on payment of rent and costs; but if there has been a tender before service of the ejectment, or suing out the writ, the proceedings are irregular, and will be set aside for irregularity."

Goodright ex
dim. Stevenfon
v. Norright.
2 Bl. Rep. 746.

As here, where a tender of rent was made, but lessor refused to accept of it because he had put the business into the hands of an attorney, and after proceeded in the ejectment, it was set aside for irregularity.

Doe ex dim.
Foster v.
Wandlafs.
7 T. Rep. 117.

4. Where a landlord has a right to enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day it becomes due, nor under stat. 4 Geo. 2. c. 28. s. 2. if there be a sufficient distress on the premises.

2dly, OF EJECTMENT, WITH REFERENCE TO THE PERSON.

Under this head I shall consider.

1. *By whom, in general, ejectment may be maintained.*

2. *By what persons in particular.*

3 Black. Com.
206.

1. "It is a *general rule*, that no person can in any case bring an ejectment, unless he has in himself at the time *a right of entry*; for as he is supposed to have entered with a good title on the land, and made a good lease to his fictitious lessee, the law will not suppose an entry made to make a lease whereby the title is to be tried."

"Therefore, where it happens that the person claiming title to the lands has *no right of entry*, he cannot maintain this action."

"And this defect of right of entry may arise in different ways: 1st, Where the party bringing the ejectment has not completed his title for want of some legal solemnity; 2dly, Where there has been a discontinuance or descent cast, which takes away an entry; 3dly, Where there has been an adverse possession for twenty years."

1st. "Where the party has not completed his title for want of some legal solemnity."

* As where the assignee of a bankrupt brought an ejectment for part of the bankrupt's estate *before the enrolment of the assignment of the bankrupt's estate made to him by the commissioners*: he was nonsuited; for the assignment is by bargain and sale, which, under stat. 27 H. 8. c. 16. is ordered to be enrolled within six months: and it is enacted by the statutes 13 Eliz. c. 7. and 21 Jac. 1. c. 19. that all the bankrupt's lands, tenements, &c. shall be sold by deed, indented and enrolled; so that before the enrolling the assignees have no legal title.

Elliott v. Danby.
Cas. K. B. 3.
* [431]

But it is otherwise in the case of a common bargain and sale; for there the estate passes by the contract, and is executed by the statute of *Uses*: but the commissioners of bankrupt have only a power which should be executed according to the statute.

Perry v. Bowers.
Sir Thomas
Jones 196.

2. "So where tenant in tail makes a feoffment in fee, and thereby works a discontinuance, and dies, the issue in tail cannot enter, and therefore cannot maintain this action: and the case is the same of other descents which toll entries."

Litt. f. 595.

So by common law, if the husband, seised in right of his wife, had enfeoffed another and died, this was a discontinuance, and took away her right of entry, so that she could not maintain an ejectment; but this is now altered by statute 32 H. 8. c. 28. which gives a right of entry to the wife, or her heirs, after the death of the husband, who had aliened lands and tenements of the inheritance of the wife; so that she or her heirs may now support this action.

So by stat. 11 H. 7. c. 20. it is enacted, "That if any woman having an estate in dower, or for life, or in tail jointly with her husband, or solely to her own use, but coming from him, shall alien, discontinue, &c. or suffer a recovery, such shall be void; and the husband's heir, or he who is entitled to the lands after her death may enter, and so may maintain this action."

Under this statute, to enable the heir of the husband to enter upon lands of the gift of the husband, and aliened by the wife against the provisions of this statute, *the remainder must have been limited to the heirs of the husband, not to a stranger*; for the statute was meant for the benefit of the husband and his heirs.

Foster v. Pittfall.
Cro. Eliz. 2.

3 "Where there has been an adverse possession for twenty years." This arises under the statute 21 Jac. 1. c. 16. which enacts, "That no person shall make an entry into lands, &c. but within twenty years after his right and title shall first accrue, with the usual savings for infants, feme coverts, and persons insane," &c.

[432]

Therefore if the lessor of the plaintiff is not able to prove himself, or his ancestors, to have been in possession within

Bull. N. P. 102.

EJECTMENT.

twenty years before the action brought, he shall be nonsuited.

Under this statute it has been held,

Per Holt, C. J.
arg. Caf. K. B.
573.

1. That if a declaration in ejectment has been delivered within twenty years, and a trial had, whereby *lease, entry, and ouster* has been confessed, if the plaintiff has been nonsuited in that action, and brings another ejectment after the twenty years expired, the former confession of lease, entry, and ouster shall not be sufficient to save the running of the statute against the plaintiff; for there must be an *actual entry* within twenty years.

2. "The possession or entry of the lessor of the plaintiff within twenty years, which is necessary to give him a title, must be an *actual possession or entry*, not a *presumptive* or implied one."

Rich ex dim.
Lord Cullen v.
Johnson.
2 Stra. 1142.

Therefore in ejectment for *mines*, the lessor of the plaintiff proved himself to be *lord of the manor*, and that he was in possession thereof: this was held to be insufficient: for the mines are a distinct possession, and may be a different inheritance from the manor; and no entry was proved to have been made *on them* in this case within the twenty years.

S. C.
Bull. N. P. 102.

So also, in the same case, a *verdict in an action of trover for lead dug out of the same mines*, in favour of the lessor of the plaintiff, was held to be not sufficient evidence of possession to support this action; for trover may be brought *on property only without possession*.

Stokes v. Barry.
Salk. 421.
3 Lord Raym.
741.

3. Proof of possession within twenty years is not only necessary to support the title of the lessor of the plaintiff, but such possession for twenty years without interruption shall be a good title in itself to recover in ejectment without any other: for an uninterrupted possession for twenty years is like a descent which tolls an entry, and gives a right of possession which is sufficient in ejectment: so that though the defendant be the person who has the legal right to the premises, yet he cannot justify ejecting the plaintiff who has had twenty years previous peaceable possession.

Roe v.
Nightingale.
Sitt. West. EaR.
1769. MSS.

* [433]

* But in such case possession of *cestui que trust* is the possession of the trustee. In this case the plaintiff could neither prove actual possession or receipt of rent by *cestui que trust*: but the judge held, That evidence of repairs done upon the premises by the order of *cestui que trust*, and for which he had paid, was sufficient evidence of the possession to put the defendant upon going into his title.

4. "So the twenty years possession, which is sufficient to bar the ejectment or to give a title, must be an *adverse* possession; for where it appears not to be adverse, the statute of limitations does not run."

As where a man seised in fee having issue two daughters devised his land to his grandson by the elder daughter in fee, the elder daughter being dead; the grandson died without issue, and the heir of the grandson, who was also heir to the father, and the heir of the other coparcener entered, and took the profits of the land by *moieties* for above twenty years, supposing that the devise to the grandson was void as to one moiety; but it being discovered that the devise was good, and so that the heir of the grandson had title to the *whole of the land*, he now brought an ejectment against the heir of the other coparcener, who had enjoyed the profits with him; when it was objected, That he had, by bringing the ejectment, admitted himself to have been out of possession for twenty years, and so was barred; but it was resolved, That the statute of limitations never runs against a man *without an actual ouster*; that here was no possession whatever in the defendants, for the heir of the grandson had the whole by devise, and the defendant was a mere stranger, and that when two are in possession, the law will adjudge it to be in him who hath right; neither can a man be disseised of an undivided moiety: therefore as he never could have been in possession there was no ouster, and the title of the lessor of the plaintiff was good for the whole.

Reading v.
Royston.
Salk. 423.

So where a man made a mortgage as a collateral security, though the *mortgagor had continued in possession for above twenty years*, yet the interest having been paid for that time, it was held, That the mortgagee was not barred in bringing his ejectment, for there was no adverse possession, their titles being the same.

Hatcher v.
Fineux.
Ld. Raym. 140.

So also in ejectments by *joint-tenants*, the possession of one joint-tenant is the possession of another so as to prevent the statute of limitations from running against the title of either.

Ford v. Grey.
Salk. 285.

* Such also is the case of *tenants in common*; for if one of them bring an ejectment against another, there must be an ouster and adverse possession proved, in order to bar the other, or the possession of one shall be held to be the possession of the other; for the mere taking of all the profits is no ejectment, unless one drives off the cattle of the other, or keeps him actually out after expulsion.

F. Irclain ex
dim. Empson v.
Shackleton.
5 Burr. 2604.
Co. Litt. 195. b.
* [434]

“ And as therefore an actual adverse possession is sufficient to give a title to one tenant in common against another, what shall be deemed so, is proper matter to be left to the jury.”

For where the defendant's title in ejectment was a thirty-six years peaceable and *sole* possession of the lands, which he originally held as tenant in common with one *Mary Taylor*, under whom the lessors of the plaintiff claimed, and if the possession was adverse, the defendant had a sufficient title: the Court were of opinion, That it was proper evidence to be left to the jury, from the presumption of so many years

Doe ex dim.
Fisher & Taylo
v. Proffer.
Cowp. 217.

sole possession, whether there was not an actual ouster and adverse possession? and the jury having found for the defendant in favour of the presumption, a new trial was applied for and refused.

Smales v. Dale.
Hob. 120.

So in ejectment by tenants in common, an entry by one tenant in common shall be good for all, for he shall be supposed to enter according to his estate.

Co. Litt. 242.

"For in general where *two persons claim by the same title*,
"there shall be no adverse possession so as to toll an entry
"of the one, but the entry of the other be at all times
"lawful."

Litt. 296, 297.

As if a man dies seised in fee, leaving issue two sons; and the younger enters by abatement and dies, leaving issue, who enters on the land; in this case the eldest son, or his heir, may enter at any time on the issue of the younger; for the younger son, having entered on the land, shall be presumed *to have claimed it as heir to his father*; and the elder son, or his heir, claiming by the same title, his entry shall be lawful.

Page v. Selby,
per Weston,
Justice, Suffex,
1680.
Salk. MSS.
Bull. N. P. 102.

So where the defendant made title under the sister of the lessor of the plaintiff, as heir, and proved that she had enjoyed the lands for above twenty years, the Court held it insufficient: for her possession would be construed to be by courtesy and licence from her brother to preserve the inheritance, and not to make a disheirson; but if the brother had been in possession, and the sister had ousted him, this had been sufficient after twenty years to have given a title to her heir.

[435]

"Therefore where one party claims *under or through the other*, there shall be no adverse possession in such case sufficient to give a title."

Bishop v.
Edwards,
per Powell,
Justice.
Bull. N. P. 103.

As if a cottage has been built in defiance of the lord, and a quiet possession had for twenty years, it is a good title within the statute as against the lord; but if it was built at first with the lord's permission, or any acknowledgment had since been made, (though it was one hundred years since,) the statute will not run against the lord, for the *possession of a tenant at will, for ever so many years*, is no disseisin; there must be a tortious ouster.

"And wherever an adverse possession is relied on, it
"seems that there should be some proof of an actual ouster;
"for presumption of adverse possession from circumstances
"shall scarcely be deemed sufficient."

1 Roll Ab. 659.
tit. Disseisin.
Bull. N. P. 104.

As if the defendant should *prove receipt of rent by a stranger*, it is no evidence of possession, so as to take it out of him in whom the right is; and it is the same though *he makes a lease to the tenant by indenture reserving rent*, unless he has made an actual entry; and it is the same though the tenant declares that he is in possession for the stranger, though it
may

may be proper evidence to be left to a jury, especially if the stranger has any colour of title.

And note, That where the ejectment is grounded on a clause in a lease giving a right of re-entry for non-payment of rent, *actual entry* is there not necessary.

Goodright ex
dim. Hare.
v. Cator.
Doug. 460.

2. *As to the particular persons who may maintain this action.*

1. "The mortgagee may maintain this action to obtain possession of the mortgaged premises or estate."

"But a distinction is to be observed where the ejectment is against the *tenant* of the lands under a lease made prior to the mortgage, and where against the mortgagor himself, or against a tenant in possession under a lease or demise made subsequent to the mortgage."

Where lands are let for years and afterwards mortgaged, the tenant's possession is protected, and he cannot be turned out by the mortgagee: but the courts now permit the mortgagee to proceed by ejectment against the tenant in possession, if he has given notice to him before the action that he does not mean to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor.

Per Lord Mans-
field.
Doug. 269.
White v.
Hawkins,
quot. Doug.
23.

* But if the ejectment is against the mortgagee, or his tenant under a lease made subsequent to the mortgage; in such case the mortgagee may recover the premises absolutely without any notice whatever to the tenant in possession: for as by the mortgage the mortgagor becomes strictly a mere tenant at will, no notice is ever given to him to quit; he is not even entitled to the crop as other tenants at will are, because all is liable to the debt; on payment of which all the mortgagee's title ceases. He therefore has no power, either express or implied, of making leases not subject to every circumstance of the mortgage. Under these circumstances, therefore, he is at all times liable to be put out of possession, without any notice or demand whatever.

Keech v. Hall.
Doug. 27.
* [436]

And if the mortgagee assigns the mortgage, and the assignee assigns to another, *this last assignee may maintain an ejectment for the mortgaged premises*; for on the execution of the mortgage-deed the mortgagor becomes as tenant at will, and by the assignment, though he becomes tenant at sufferance, yet his continuing in possession can never make a disseisin or divesting of the term, and so an ejectment can well be maintained.

Smartle v.
Williams.
Saik. 245.

But if after the day of payment elapsed, the mortgagee brings his ejectment, the Court will stay proceedings on payment of principal, interest, and costs.

Anon.
1 Stra. 413.

A second mortgagee who has taken an assignment of a term to attend the inheritance, and has all the title-deeds, and who

Goodtitle ex
dim. Norris &
alt. v. Morgan.
1 T. Rep. 755.

who had no notice of the first mortgage, may maintain an ejectment for the mortgage-lands *against the first mortgagee*: for it was the duty of the first mortgagee to have taken the title-deeds to accompany his mortgage, as by leaving them in the hands of the mortgagor, he enables him to commit a fraud; and as the second mortgagee is a purchaser without notice, he is entitled to a preference.

“ But where the mortgage has been granted under illegal circumstances, the defendant may avail himself of it at the trial of an ejectment for the mortgaged premises.”

Doc ex dim.
Davidson v.
Barnard & alt.
Aff. of Tim-
mings, a bank-
rupt.
Sitt. West. East.
1793. MSS.

As where in an ejectment by the mortgagee, the defence set up was, that the money for which the mortgage was granted was lent *on an usurious agreement*; the transaction stated on the part of the defendant was, that the mortgagee, on being applied to for the loan of the money on the mortgage in question, said that his money was in the stocks, which he must sell out at a considerable loss, they being then at 73*l.*, but that if the mortgagor would take them at 75*l.* that he should have the money at that rate; and it was proved that stock valued at 75*l.* was transferred to the mortgagor to the amount of 1500*l.*, and that he sold out at the same time for 72½, which was the current price of the day. Lord *Kenyon* held this agreement to be clearly usurious, and nonsuited the plaintiff.

2. “ *The devisee of a term of years* may maintain ejectment to recover the term devised: but it is necessary to shew the assent of the executors to the devise.”

Young v.
Holmes.
1 Stra. 70.

As where the lessee for years devised his term to his executor for life, paying fifty pounds to *J. S.* remainder to the lessors of the plaintiff; the executor died, and his executrix possessed herself of the term; on ejectment being brought it was held, That the executor took the term *as executor*, and so that the remainder over to the lessors of the plaintiff was not executed, and that it was therefore incumbent on him to prove a special assent thereto as to a legacy: but upon proof of payment of the 50*l.* legacy, charged upon the term in the hands of the executor, that was held to be sufficient proof of the assent; and the plaintiff had a verdict.

[437]

Co. Litt. 240. b.

“ But in the case of the devise of a *freehold*, the devisee may immediately, and without any possession, maintain an ejectment for the lands devised: for after the testator’s decease the law casts the freehold on the devisee; and even should the heir enter and die seised, and a descent be cast, yet may the devisee enter, and so maintain an ejectment; for otherwise he would be without remedy.”

Wood v. Palmer.
Per Blencowe,
at Dorchester,
1699. Salk.
MSS.
Bull. N. P. 104.

3. *Conussee of a statute merchant* may bring an ejectment, but then he must prove a copy of the statute, and *the returns of the capias si laicus, the extent & liberate.*

For

For though by the return of the extent an interest vests in the *conusee*, yet the actual possession is under the *liberate*; and without such right of possession this action is not maintainable.

Hammond
v. Wood.
2 Salk. 563.

4. "*Tenant by elegit* may maintain this action to be put into possession under the *elegit*, of the lands returned by the inquisition before the sheriff."

Dougl. 456.
Bull. N. P. 104.

But he should prove the *judgment*, the *elegit* taken out on it, and the *inquisition and return* thereon, by which the land in question has been found: and it should appear that the *elegit* had been lawfully executed; for if more than a moiety has been extended, the execution is void, and an ejectment cannot be maintained on it, nor the possession recovered on this title.

Ld. Raym. 718,
Putten v.
Purbeck.
Salk. 563.

But in executing an *elegit* the sheriff is not bound to deliver a moiety of each particular tenement and farm, but a valued moiety of the whole; for as he is to deliver possession by metes and bounds, by such means only can a complete execution be made.

Den ex dim.
Taylor v. Lord
Abingdon.
Dougl. 456.

5. "Assignees of a bankrupt may maintain an ejectment for lands which belonged to the bankrupt."

1. For by the assignment all the bankrupt's property, real and personal, is vested in the assignees, under stat. 13 *Eliz.* 7. *f.* 2., and therefore they must be invested with all the powers necessary to get it into possession.

But the assignment shall only operate on the lands in the bankrupt's possession at the time of the assignment made; but lands which he shall purchase during his bankruptcy, or which shall descend to him, or in anywise come to him during that time, must be conveyed to the assignees by a new deed, stat. 13 *Eliz.* 7. *f.* 11.

Ex parte
Proudfoot.
1 Atk. 253.

[438]

Therefore if an ejectment is brought by the assignees for lands which may have come to the bankrupt after his bankruptcy, and before the allowance of his certificate, they should give in evidence a special conveyance of this part.

2. A sale by the commissioners of *lands of which the bankrupt is seised in tail*, by deed enrolled, shall have the same effect to bar the entail as if a recovery had been suffered of them, by stat. 21 *Jac. c.* 19. *f.* 12.

And where the bankrupt, who was seised in tail, had made a mortgage before his bankruptcy, but had neglected to suffer a recovery, and died after his bankruptcy, upon which this ejectment was brought by the assignees, and held that the tenant in tail, not having suffered a recovery, was only tenant for life, and the mortgage-title at an end, and that they should recover; it was moved in the case, That as the assignment by the commissioners had the same effect

Beck ex dim.
Hawkins v.
Walsh.
1 Will. 276.

as a recovery, and as in case the bankrupt had suffered a recovery, that it would let in the mortgage, that therefore the assignment should; but it was resolved, That the statute was made for the benefit of the creditors who had no specific lien on the lands of the bankrupt, and that it would be absurd that this statute should have a contrary effect, to make good a defective title to a particular creditor to the injury of the rest.

6. If a *rent-charge* be granted to any one, with a proviso that if the rent be in arrear that it shall be lawful for the grantee, his heirs, and assigns, to enter and hold the lands out of which the rent-charge is granted, till he shall be satisfied of the arrears; this shall give to the *grantee of such rent-charge* such an interest that he may maintain an ejectment for the lands; for the law does not give to any body an interest without a remedy; and if grantee has a right to hold such possession, he ought to have this action by which it may be gained.

7. *The committee of a lunatic* cannot bring an ejectment in his own name for the lands of the lunatic; it should be in the name of the lunatic, for the interest and estate still remain in the lunatic, and the committee is but as bailiff.

And for another reason, that the committee of a lunatic cannot make leases of the lunatic's land, and so cannot make the necessary demise in ejectment.

* 8. *An infant* may maintain an ejectment; but he must name a good plaintiff, who may be answerable for the costs.

9. *Executors* may maintain ejectment for land let to their testator for years, *if the testator is ousted*; for by stat. 4 Ed. 4. c. 6. an action is given to executors for goods taken out of their testator's possession, and the act extends to this case, because the term itself is recovered.

So if the *executors themselves* of the lessee for years are ousted, they may either have a special writ on the case (*F. N. B. 92. Reg. 97.*) or maintain an ejectment.

Where *the tenant from year to year* as long as the lessor and lessee pleased, died, it was adjudged, that *his administrator* might maintain an ejectment; for it was a chattel-interest, and the administrator has the same interest which the intestate had.

So if the spiritual court grant an *administration pendente lite*, such an *administrator* may maintain an ejectment.

10. "*An alien* cannot maintain an ejectment; for an alien cannot take lands by descent."

As to the issue of aliens, and children born out of the realm, it is settled,

By

Jemott v.
Cowley.
1 Saund. 112.
Sid. 223. S. C.

Kocks v.
Darfon.
Hob. 215.
Anon.
Hutt. 16.

Knipe v.
Palmer.
2 Willf. 130.

Nokes v.
Windham.
1 Stra. 694.
2 Stra. 932.
S. P.

* [439]
7 H. 4. 6. b.
4 Co. 94. a.
2 Vent. 20.

4 Co. 95. a.

Doe ex dim.
Shore v. Porter.
3 T. Rep. 13.

Per Lord Hard-
wicke.
2 Atk. 286.
Co. Litt. 7. b.

By stat. 25 *Ed.* 3. *f.* 2. Children whose fathers and mothers at the time of their birth should be liege subjects of *England*, are to be inheritable to lands within the kingdom, though such children were born out of the kingdom.

And by stat. 7 *Ann.* c. 5. & 4 *Geo.* 2. c. 21. it is enacted, "That all children born out of the ligeance of the crown of *Great Britain*, whose fathers are natural-born subjects, shall be deemed natural-born subjects, and so may inherit lands."

But where the mother is a natural-born subject, and the father an alien, in such case a child born abroad cannot take lands by inheritance, even though the lands came by descent from the mother. Dee ex dim.
Duroure v
Jones.
4 T. Rep. 300.

11. When a corporation aggregate bring ejectment, they should give a letter of attorney to some person to enter and seal a lease on the land, for they cannot enter and demise on the land as natural persons; and such demise should be declared on. Bull. N. P. 98.

"But it seems doubtful whether this now is necessary: at all events it is cured by a verdict."

*For where in ejectment the plaintiff declared on a demise by the aldermen and burgesses of *Bury*, but without setting out that the demise was by deed, or under the seal of the corporation: on a writ of error brought, this was assigned for error, but it was held to be well enough; for this being a fictitious action, the demise need not now be set out to be by deed. Patrick v. Balls.
1 Ld. Raym.
136,
* [440]

Neither is it necessary at the trial to prove such demise by deed; for it is only the common demise by the lessor of the plaintiff, which is never expected to be proved. Furley v. Wood.
Espin. N. P.
Caf. 199.

"So corporations sole may bring ejectment."

As where the copyholders of a manor belonging to a bishopric, during the vacancy of the see, committed a forfeiture by cutting timber, the succeeding bishop was allowed to maintain an ejectment for the lands so forfeited. Read v. Allen.
Per Comyns, at
Oxford, 1730.
Bull. N. P. 108.

10. If a copyholder is ejected by his lord, he can maintain an ejectment against him; for though he is called a tenant at will, yet it is according to the custom of the manor, and the copyholder cannot be put out while he performs his services. Litt. f. 77.

But in such case it seems to be necessary that the copyholder is warranted to make leases either by the custom of the manor, or by licence of the lord; in which case he may clearly have this action. Anon.
1 Leon. 4.
Goodwin v.
Longhurst.
Cro. Eliz. 535.

And even without a custom to warrant such leases, in the case of an ejectment, the copyholder could maintain this action against all persons except the lord. Spark's case.
Cro. Eliz. 676.
Co. Copyh.
f. 51.

So

Melwich
v. Luter.
4 Co. 26. a.

So if the *lessee of a copyholder* is ejected by a stranger, he may have this action.

"So also the lord shall in this action recover the "copyhold, where the copyholder has committed a forfeiture."

Peters ex dim.
Bishop of Winchester v. Mills.
Per Tracy
Bar. 1707.
Bull. N P. 107.

And in such case where the plaintiff makes title in the lessor as lord of the manor, he ought to prove that his lessor is lord, and the defendant a copyholder, and that he committed a forfeiture; but the presentment of the forfeiture need not be proved, nor the entry, nor the seizure of the lord for the forfeiture.

Bull. N. P. 107.

If the ejectment is brought against the lessee for years of a copyholder, (relying on the lease as a forfeiture,) the plaintiff must prove an actual admittance of the copyholder, and it will not be sufficient to prove the father admitted, and that it descended to the defendant's lessor as son and heir, and that he had paid quit-rents; for an actual admittance should be proved, for nothing vests in him before admittance and an actual entry, so that a lease made under those circumstances would be void; for a copyholder cannot make a lease before admittance, except to try a title.

[441]

Auncelm v.
Auncelm.
Cro. Jac. 31.

But if a copyhold is surrendered to one for life, remainder to another in fee, the admittance of the tenant for life is the admittance of him in remainder, though he himself never was admitted; for both make but one estate.

Jurden v. Stone.
Hutt. 18.

So where a widow is entitled to her free-bench after the death of her husband, she may maintain an ejectment before admittance; for it cometh out of the husband's estate.

Wilson v.
Weddell.
Yelv. 144.

But in the case of a *surrender*, no complete title vests in the surrenderee *till admittance*, for till then it remains in the surrenderer; and if he dies, it is so much in him that his heir may maintain ejectment.

Holdfast ex dim.
v. Clapham.
1 T. Rep. 600.

But if a surrender is made, the admittance shall relate to that time, so that surrenderee may recover on a demise laid between the time of surrender and admittance.

3. OF SERVING THE EJECTMENT.

Savage v. Dent.
2 Stra. 1064.

1. If it is known where the tenant lives, he should be *personally served* with the ejectment, if he does not live on the premises for which the ejectment is brought. And therefore in this case, where the attorney for the plaintiff *knew where the defendant lived*, but did not serve him, it was held to be irregular.

So where the ejectment is for non-payment of rent, the words of stat. 4 Geo. 2. c. 28. are, "That the lessor may, without any formal demand or re-entry, serve a declaration in ejectment; or in case the same cannot be legally served, or no tenant be in actual possession, then affix the same upon the door of any demised messuage; or in case there be no messuage, then upon some notorious place on the lands."

S. C.
Bull. N. P.

"In proceedings therefore under this statute, or at common law, the lessor of the plaintiff must proceed by personal service, if possible."

And therefore where the lessor of the plaintiff in this case proceeded as if the possession was vacant, (that is, by sealing a lease as on a vacant possession, delivering an ejectment, and signing judgment,) and it appeared that at the time, though the lessee had quitted the house and removed his goods and family, yet that he had left some beer in the cellar, this was held to be such a possession as to make the proceedings which had been as if the possession had been vacant, irregular; and they were set aside.

Savage v. Dent.
ante.

[442]

2. But if the tenant himself cannot be found, then service on a wife or servant on the premises shall be sufficient; if on the wife it is sufficient; but if the service is on the servant, in that case there should be some acknowledgment from the tenant that he received it.

Goodright ex dim.
Waddington v. Thrustout.
2 Black. Rep. 800.

As where the service was on a servant, and the tenant in a letter to the lessor of the plaintiff's attorney acknowledged the receipt of it, and begged his interference to prevent the plaintiff's lessor from proceeding, it was held to be good.

Anon.
Salk. 255.

So the declaration in ejectment may be served on the wife, either on the premises or at the husband's house.

Doe v. Bayliss.
6 T. Rep. 765.

3. "So in all cases where the tenant cannot personally be served, the Court will, by rule of court, order particular services of the ejectment to be good, so as to give a good judgment to the plaintiff."

As where on affidavit that the tenant in possession had absconded, and that a declaration in ejectment had been served on a person in the house, and another copy fixed to the premises, the Court thought it sufficient service, and made a rule on the tenant in possession to shew cause why judgment should not be entered up against the casual ejector.

Knightly ex dim.
Collins v. Dunch.
2 Burr. 1106

So where the rule was to shew cause why the service of the ejectment, which had been made upon a woman who called herself *M. Campbell*, (then in the house,) should not be deemed good service, and why the lessors of the plaintiff

Fenn ex dim.
Tyrrel v. Denn.
2 Burr. 1181.

should not be at liberty to enter up judgment against the casual ejector; this rule was made absolute on an affidavit that *M. Campbell* was either not at home or denied, but that a copy of the rule was affixed to the door, and another thrown in at the window.

Goodright ex
dim. Methold
v. Wright.
2 Burr. 1161.
in marg.

So on affidavit that one *Hawkins* and his wife both kept out of the way, to prevent their being served with the ejectment personally, a rule was made that service on a servant in the house of *Hawkins* should be sufficient.

Douglas v.
1 Stra. 755.

So leaving the ejectment at the house was ruled to be sufficient service, it appearing that the servant had refused to receive it, by order of his master.

Bull. N. P. 98.

4. "If there are several tenants of the premises, there must be a declaration in ejectment delivered to each of them."

Lill. Pr. Reg.
409.

[443]

And the person who swears to the service of the ejectment, must swear positively that such a one is tenant in possession: that he read the indorsement to him, and acquainted him with the contents thereof; and upon this affidavit the plaintiff moves for judgment against the casual ejector, which is granted, unless the tenant enters into the usual rule to confess lease, entry, and ouster.

Smith v. Crabb.
2 Stra. 1149.
and note.

But in such case, though the title is the same, the Court will not consolidate the declarations, and make one issue of them, for it would be making the plaintiff go on against all the defendants, when he might be ready in some of them only.

5. If the declaration in ejectment is delivered before the effoign-day of the issuable terms, the tenant is bound to plead within eight days in that term, without further notice: but if the declaration is not served before the effoign-day of the other terms, the party is not bound to plead without motion made, and a rule obtained in these respective terms.

Anon.
Salk. 257.

And when the declaration was delivered after the effoign-day of *Michaelmas* term, the plaintiff let that term pass without doing any thing, and also *Hilary* term, till the last day, when he moved for a rule to plead, and for want of a plea signed judgment: the Court set it aside, for when the plaintiff lets a whole term elapse, he must give a new notice.

Armstrong v.
Thrustout.
Sayer's Rep. 49.

For the notice to appear to an action of ejectment must be to appear in the next term, after that of which the declaration is.

6. By stat. 11 Geo. 2. c. 19. "The tenant must give notice to his landlord of any declaration in ejectment served on him, under penalty of three years rent."

But

But this statute does not extend to cases where the ejectment is brought by the mortgagee to be put in possession of the mortgaged premises, without disturbing the lessee's possession, but only to have his attornment. The statute only extends to cases where *the ejectment is on a title adverse to that of his landlord.*

Buckley v.
Buckley.
1 T. Rep. 647.

And where the tenant had not given notice to the landlord of the ejectment, and there was judgment against the casual ejector, the Court set aside the judgment, and ordered the tenant to pay all the costs to the lessor of the plaintiff, on the landlord's entering into the usual rule to try the title: or the landlord may bring a writ of error, which will be a supersedeas of the proceedings under statute 11 Geo. 2. and stay the proceedings.

Doe v. Roe ex.
dim. of
Troughton.
4 Burr. 1996.

Jones v. Ed-
wards.
2 Stra. 1241.

After service of the ejectment, the defendant should, in case he means to defend the title, appear and confess lease, entry, and ouster, which brings the title only into issue; after which the plaintiff is to declare.

[444]

4. OF THE PLEADINGS.

I. ON THE PART OF THE PLAINTIFF.

1. With respect to the Things for which this Action lies.

1. "The declaration should always be according to the plaintiff's title and set it out as it is, and shew a good and subsisting one in him at the time of the ejectment brought."

For where the plaintiff declared, "That the said J. S. (the lessor of the plaintiff), on the 24th day of June 1650, had demise the premises to him, to hold from the said 24th of June, by virtue of which on the day and year last mentioned he had entered, and that the defendant afterward, (to wit,) on the 24th of June, had evicted him; this was held to be bad, for, from being exclusive, the lease did not commence till the 25th of June, so that he was a disseisor by his entry; and so the plaintiff had laid the commencement of his lease before his title accrued: but it would be good in replevin.

Goodgain v.
Wakefield.
1 Sid. 7.
Macdonnel v.
Welder.
1 Stra. 550.

"And therefore the demise by the lessor of the plaintiff must always be laid after his title has accrued."

For where the ancestor of the lessor of the plaintiff, under whom he derived, died at five o'clock in the morning of the first of January, and the demise laid was on that day, it was insisted, that as the law admits no fraction of a day, that the estate for the whole day was in the lessor of the plaintiff's ancestor, and so that the lessor himself had no title to demise at the time laid in the declaration; but the objection

Roe ex dim.
Wrangham v.
Herley.
3 Will. 274.

was over-ruled, for the allowance of the fraction of a day is a fiction in law, which never does wrong.

Goodtitle ex
dim. Gallaway
v. Herbert.
4 Term Rep.
680.

But where the defendant had been tenant at will to the lessor of the plaintiff, possession had been *demand*ed and *re-*
refused on the 5th of October; an ejectment was brought, and
the demise laid the 1st of October; it was adjudged that the
plaintiff could not recover, for the tenancy was not deter-
mined on the day of the demise laid in the declaration.

Basset v. Basset.
16 Dec. 1744.
In Canc.
Eull. N. P. 105.

[445]

So where the ejectment was brought by a posthumous
child, and the demise laid from the death of his father,
Lord *Hardwicke* was of opinion that it was good, and that
the defendant was estopped to say that the lessor of the
plaintiff was not born at the time of the demise laid, by stat.
10 & 11 W. 3. c. 16.

“ But it is not necessary to lay any day certain upon
“ which plaintiff entered; it is sufficient to lay a demise,
“ and then say in general *that he afterwards entered*: for so
“ are the precedents.”

Roe ex dim.
Lee v. Ellis.
2 Black. Rep.
940.
Salk. 257.

And if the term demised to the plaintiff is expired, or
likely to expire, before trial, the Court will upon motion
enlarge the term, though former practice would not allow it.

2. “ The declaration should state the ejectment by the
“ defendant as done *subsequent to the date of the supposed lease*
“ *made to him by the lessor of the plaintiff*; for otherwise the
“ ejectment, which is the injury complained, would pre-
“ cede the time of the accruing of the plaintiff’s title, and
“ so there would be no cause of action;” as in *Goodgain v.*
Wakefield, ante 444.

Buller N. P. 106.

But though this is the right and proper form of declar-
ing, yet this being a fictitious action, it is not fatal if laid
otherwise: for cases have occurred in which the ejectment
has been laid prior in point of time to the demise, and yet
the Court held it to be good; that is, where the plaintiff
declares on a certain demise, and that defendant *afterwards*
ejected him, and then under the *seiz.* mentions a day prior
to the demise, in which case the *seiz.* being inconsistent with
the *afterwards*, shall be rejected as surplusage.

Adams v.
Goose.
Cro. Jac. 96.

As where the plaintiff in ejectment laid his lease on the
6th of *September 2 Jac.*, and that the defendant, *postea seiz.*
on the 4th of September 2 Jac. did eject him. Objection
being taken on the ground of the ejectment being laid pre-
cedent to the demise, the Court nevertheless held the decla-
ration good, the time laid under the *seiz.* being inconsistent
and repugnant.

Swimmer ex
dim. v. Grose-
nor, Barr.
Salop Ass. 1752.
Buller N. P. 106.

So where the plaintiff in ejectment declared on a lease,
dated 1 Feb. 1742, to hold from the 8th of *January* before,
and that afterwards, viz. *on the 28th of January* defendant
had

had ejected him; it was insisted for the defendant, that the ejectment was laid before the plaintiff's title under the lease, which was not made till the first of *February*: and 1 *Sid.* 7. was quoted: but the Court held, that the day of the ejectment being laid under a *videlicet*, was surplusage, and should be rejected, and that *afterwards* should relate to the time of making the lease.

For the plaintiff in his declaration need mention *no particular day of the ouster*, so that it appears to be before the action brought, and, after the term commenced; though in the precedents a certain day is always laid.

Merrel v. Smith.
Cro. Jac. 311.
[446]

3. "These are cases of repugnancy before a trial; but a verdict will cure almost all repugnancies, except such as affect the title."

As where the plaintiff declared on a lease made in *the thirty-third of the reign of King George the Third*, which was an impossible time, the ejectment being in *the first year* of that king, plaintiff had a verdict; this being moved in arrest of judgment, the Court held it to be amendable.

Small ex dim. Baker v. Cole & Skinner.
2 Burr. 1159.

"But if the fault *goes to the title*, or is in the process, it is not amendable."

As where in the declaration delivered to the tenant in possession, the said *James* instead of *John* was said to enter by virtue of the demise; the Court refused to amend it, for they considered it as process. And Justice *Wright* cited a case of *Hil. 15 G. 2.* where the premises were said to lie in *Tawickenham, or Isleworth, or one of them*; and the Court refused to let the plaintiff amend, by striking out the disjunctive words.

Goodtitle v. Méymot.
2 Stra. 1211.

4. "The declaration in ejectment should state a certain quantity, and the nature of the land to be recovered; as arable, pasture," &c.

For where the ejectment was for a messuage and close, containing three acres, and verdict for the plaintiff, the judgment was arrested, for it was not sufficient to state the quantity only, without also setting out the nature as arable, meadow, &c.

Ed. Savill's case.
11 Co. 55.

"And so it is not sufficient to set out the nature only, without also setting out the quantity."

For where the ejectment was for a close of meadow called *Partridge's Lees*, containing ten acres, more or less, it was held to be ill; for the quantity of acres ought to appear in the declaration.

Holdfast v. Wright.
Mich. 12 G. 1.
C. B.
Buller N.P. 109.

And in like manner where the ejectment was for five closes of arable and meadow, called ———, containing twenty

Knight v. Symes.
Salk. 254.

twenty acres in *D.* : upon *not guilty* pleaded, and verdict for the plaintiff, the judgment was arrested, because it was not shewn how much there was of one, and how much of the other.

“ For an uncertainty in these respects in the declaration “ is an incurable fault.”

Eurbury v.
Yeomans.
Sid. 295.

* [447]

Goodright ex
dim.
Welsh v. Ford.
3 Willf. 23.

* As where the ejectment was for seven messuages or tenements, the declaration was held to be ill, for the uncertainty of whether they were messuages or tenements : And though in a modern case the demise was so laid to be of a messuage or tenement, and the Court were well inclined to get over the objection, yet they held themselves bound by former decisions to adjudge the uncertainty to be incurable.

Per Twifden,
Just.
1 Sid. 295.

But if the ejectment was for one messuage or tenement, called the *Black Swan* ; it had been good, for the last words fix it to a sufficient degree of certainty.

“ But the plaintiff is not bound to declare for the *exact* “ quantity which he has a right to recover.”

“ For he may declare for any indeterminate quantity ; “ and the form now used is so, *viz.* one thousand acres of “ pasture,” &c. And he shall recover according to the quantity to which he proves a title.

Guy v. Rand.
Cro. Eliz. 13.

As where the plaintiff declared in ejectment for one hundred acres of land, and shewed his lease in evidence, which was only of forty acres, and it was contended that he had failed in his case, for there was no such lease as that on which he had declared ; but it was ruled to be good for so much as was comprised in the lease, and for the residue, that the jury might find the defendant not guilty.

2 Roll. Ab. 734.
Id. 719.
Goodwin v.
Blackman.
3 Lev. 334.

So if the plaintiff declares for any thing, and proves a title to but a moiety, he shall only recover so much : as where it was for an house, and the proof only went to shew that part of it was built on the plaintiff's land by encroachment, he recovered so much as was so built on his land.

Doe ex dim.
Burgefs v.
Purvis & al.
1 Burr. 326.

But though the plaintiff may thus recover in ejectment *less than he declared for* ; yet if he proves a title *to more than* he has declared for, he shall not recover it ; for he can recover no more than he goes for in his declaration.

“ So though the plaintiff declares for a *time longer than* “ *he has a right to recover*, yet he shall recover according to “ what his title really is.”

Bedford ex dim.
Carruthers v.
Dendien.
Sittings after
Trin. 5 G. 3.
Bull. N. P. 106.

For where the plaintiff declared on a lease for seven years from the 25th of *March* 1765. In proof it appeared that *J. S.* who was seised in fee, had demise the premises in question for *seven years* to *D.* in 1763, and that he in 1764 had

had assigned the unexpired residue of his term to *Carruthers*, so that if he recovered in this action, under this demise, he must recover for two years longer than he had a title. But, *per Lord Mansfield*, if the lessor of the plaintiff has a title, though but for one week, he ought to recover it, for *the true question in ejectment is, who has the possessory right?* And therefore in this case the plaintiff should recover accordingly.

[448]

5. " But a very exact description of the nature of the land is not required, and greater latitude is now admitted than formerly; because the lessor of the plaintiff is to *shew the lands* to the sheriff, and to take possession of them at his peril."

1 Barr. 626.

Therefore descriptions of certain kinds of land of local use have been held to be good.

As where it was for one hundred acres of *mountain* in *Ireland*; it was held to be good.

Lord Kildare
v. Fisher.
1 Stra. 71.

So for *bog* in the same kingdom.

Ibid.

So for *alder carr* in *Norfolk*.

Barns v. Peter-
son.

And in many other instances.

2 Stra. 1063.

6. In ejectment for *tithes*, under statute 32 H. 8. it is not sufficient to declare *for all and every kind of tithes* in such a parish, it should specify *the particular nature and quality*, as of hay, wool, &c. in like manner as in declaring for land it is necessary to shew the quality; for the words of the statute are to that effect.

Sir Henry Har-
pur's case.
11 Co. 25. b.

" So the ejectment should state the demise to have been made by deed." Though said in Lord Raym. 136, not to be necessary in the use of a corporation.

Swaddling v.
Peers.
Cro. Jac. 613.
Denied 1 Ld.
Raym. 136.

For where the ejectment was for tithes, not saying by deed, the judgment was reversed.

Angel v. Rolfe.
2 Keb. 376.

2. With respect to Persons who may maintain this Action.

1. " If the declaration states the demise to the plaintiff to be of several lessors, it must appear that each had a title to the whole of the land or the premises demised, or the declaration will be bad. For if one has not an interest in the whole, he cannot be said to demise it."

Therefore where in ejectment the plaintiff declared on a lease made by *A.* and *B.* and on *not guilty* pleaded, the jury found a special verdict, *That A. was tenant for life* of the lands in question, and *B. had the remainder in fee*, and that

Treport's case.
6 Co. 14. b.
King v. Berry.
Poph. 57. S. P.

A. was living. On this finding, it was adjudged against the plaintiff, for it was not the lease of *A.* and *B.* but the lease of *A.* during his life, and the confirmation of *B.*

Mantle v. Wool-
lington.
Cro. Jac. 166.
Co. Litt. 200.
Heatherley ex
dim. Worthing-
ton v. Weston.
2 Willf. 232.
S. i.

* [449]

Moore v. Furf-
den. Show. 342.
Morris v. Barry.
2 Str. 1181.
1 Willf. 1. S. C.
Boner v. Juner.
1 Ld. Raym.
726.
2 Keb. 700.

Wiscot's case.
2 Co. 61.

Wells v.
Partridge.
Cro. Eliz. 469.
717.

Dorrell v.
Collins.
Cro. Eliz. 6.

Turner v.
Barnaby.
Salk. 259.

2. Therefore, on the same principle, if *tenants in common* join in a lease of their land to bring an ejectment, it will be * bad; for they are in by several titles, and therefore the freehold is several, and consequently each cannot demise the whole. So that there should be a *distinct count on the demise of each*, or they may join in a lease to a third person, and such person may make a lease to try the title.

But *joint-tenants* may join in a lease to try the title in ejectment; for being seised *per my et per tout*, each has a title to the whole, and so his demise of it is good.

And for the same reason *coparceners* may join in a lease to the plaintiff in ejectment; but the usual mode is to join in a lease to a third person, who demises to the plaintiff; for a demise of all the parts is a demise of the whole.

3. *Husband and wife* may join in a lease to the plaintiff in ejectment, without saying that it was by deed, though formerly held to be necessary.

4. Where the lessor of the plaintiff claims by lease under a *copyholder*, he must shew, that by the custom of the manor, the copyholder may let such leases for years: and if this be not set out in the declaration, and the count be general, it shall be esteemed a lease at common law, which a copyholder cannot make.

5. If the plaintiff declares as *administrator*, he may declare generally that administration was granted by the bishop of —, without saying that he was ordinary, or had the right of granting administration.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. "The tenant in possession must apply to the Court to be made defendant, in the room of the casual ejector. This is done by rule of court, on condition of his confessing lease, entry, and ouster."

But if the defendant does not appear at the trial and confesses lease, entry, and ouster, the plaintiff must be nonsuited, as he cannot *prove* any of these requisites; and then upon return of the *posse* judgment is given against the casual ejector, and it is indorsed on the *posse* that the nonsuit was for not confessing lease, entry, and ouster. Upon this the plaintiff is entitled to have his costs taxed against the defendant; and if they are not paid, an attachment will go.

If there are several defendants, and some of them do not appear and confess lease, entry, and ouster, a verdict will be taken for them, and then the plaintiff shall have * judgment against the casual ejector for the lands of which these defendants were in possession.

Claxmore v. Searle.
2 Ld. Raym. 729.
Ellis v. Knowles.
1 Barnes. 118.
* [450]

2. By stat. 4 H. 7. c. 24. "Where a fine has been levied of lands, unless an actual entry is made to avoid it within five years, it shall be a complete bar to all persons whatever, except *femes covert*, (not parties to the fine), persons under the age of twenty-one years, in prison, in parts beyond the sea, or of *non sane* mind, who have five years to make their claim and entry after their disabilities removed.

1. "But if the five years begin to run while the party is not under any of the disabilities mentioned in the statute, though he afterwards becomes disabled, yet shall he be barred by the statute."

For where the lessor of the plaintiff was an infant when the fine was levied, which was in *Trinity Term* 1775, but came of age in *Feb.* 1784, and in *Dec.* 1784 was imprisoned for debt, and so continued till 1789, when the ejectment was brought, it was resolved, That not having made an entry when he came of full age, when he was at large, that the statute ran against his claim, though so soon after another disability incurred.

Doe ex dim.
Duroure v. Jones.
4 Term Rep. 300.

2. "And an actual entry must be made."

In this case the ejectment was by *trustees in a marriage-settlement*, in whom a term was vested for raising children's portions: the person in possession claimed under a mortgage subsequent to the term, in which was a covenant to levy a fine, and a fine levied accordingly: it was objected that the plaintiffs could not recover, not having made an entry; and, *per* Baron *Smythe*, the trustees were clearly entitled to avoid the fine by entry; but by the fine their estate was divested, and they cannot maintain an ejectment before entry; so the plaintiff was nonsuited.

Holdfast v. Roe.
Worcester Surr. Ass. 1757. MSS.

And where the ejectment is for lands *which have been passed by a fine*, the confession of lease, entry, and ouster, by the tenant, is not sufficient, the lessor of the plaintiff must make an actual entry; and ordering one to deliver a declaration in ejectment to the tenant in possession will not amount to an entry sufficient.

3 Burr. 1897.
Jenkin v. Prichard.
Mich. 30 G. 2.
C. B.
Bull. N.P. 103

Therefore where, to avoid a fine, lessor of the plaintiff made an entry, but having brought his ejectment, he laid the demise *three months before his entry*. It was adjudged that an actual entry being necessary to avoid a fine, and give him title, and he having laid the demise *before his entry*, that he had then no title, and so could not recover.

Berrington v. Parkhurst.
2 Str. 1086.

Musgrave ex
dim. Hilton v.
Sir Jno. Shelly.
Wilf. 214.

* [451]

But where the lessor of the plaintiff made an actual entry on the lands in *September 1744*, and laid his demise in * ejectment in *October* of the same year, though a fine was levied by the defendant of these lands in *Easter Term 1745*, it was adjudged, That the entry being *precedent to the fine*, it was sufficient to enable the lessor of the plaintiff to make a lease to try the title.

3 Burr. 1897.

“ In other cases the confession of lease, entry, and ouster “ is sufficient ; as if the ejectment is brought for a *condition “ broken*, it is sufficient.”

Little v. Heaton.
Salk. 259.
Dougl. 460.

For where the ejectment was brought by the lessor against the lessee, on a condition of *re-entry for non-payment of rent*, proof of an actual entry and ouster was held to be not necessary.

Oates ex dim.
Wigfall v.
Brydon.
3 Burr. 1895.

So where the ejectment was by *one tenant in common against another*, proof of an actual ouster was held to be not necessary, and that the confession of lease, entry, and ouster was sufficient to prevent a nonsuit.

S. C.
Buller N.P. 109.

But in the case of tenants in common, if in fact there has been no actual ouster, the defendant ought to apply to the Court not to compel him to confess, or permit him to do it specially ; which the Court will do where it is only matter of account, and the only ouster is by pernancy of the profits, without an actual obstruction of the other to occupy.

Ford v. Gray.
Salk. 286.
5 Ref.

And the levying of a fine by one joint-tenant is not an ouster of his companion.

Buller N. P.
Edit. 1775, 102.
quot. Dougl.
468.
as an authority.

In delivering the opinion of the Court in *Goodright v. Cater*, Dougl. 468. Lord Mansfield says, That in the case of a *fine only* is an actual entry necessary to be proved. But the reporter makes a *quare*, and that the doctrine is contrary to Lord Mansfield's own doctrine in *Burr. 1897*, where he mentions that an actual entry is necessary to *prevent the operation of the statute of the limitations* ; and *Dormer v. Fortescue* in *Dom. Proc.* is there given as the authority : so that it seems an actual entry in the case of the statute of limitations is necessary.

By stat. 4 Ann. c. 16. s. 16. it is further enacted, “ That “ no claim or entry shall be sufficient to avoid a fine levied “ with proclamations, unless the action be commenced with- “ in one year after making such entry or claim ; and to avoid “ the statute of limitations, unless the action has been com- “ menced within the same time.”

3. And as to *what shall be a sufficient entry*, it has been decided,

Anon.
Skin. 412.

1. That in this case where a fine had been levied, the lessor of the plaintiff proved, that he had gone to the house in question, and at the gate said to the tenant, that he was heir of

of the house and land, and forbad him to pay any more rent to the defendant, but *that he had not entered the house when he made the demand.* On which it was agreed, that *the claim at the gate without entering the house* was insufficient. Then it was proved that there was a court before the house, and which belonged to it; and that though the claim was at the gate, yet that *it was on the land, and not in the street*: this was holden to be a good entry, and clearly to support ejectment.

So where a *stranger made an entry* on the premises, on behalf of the lessor of the plaintiff, but *without any authority from him at that time*, claiming for him under a will, but the lessor of the plaintiff assented to it before the day laid in the demise; the Court were clearly of opinion that the entry was sufficient to support the ejectment brought on the title, the subsequent assent having established the validity of the first entry.

Fitchet v.
Adams.
2 Str. 1128.

3. It is enacted by statute 11 Geo. 2. c. 19. "That where an ejectment is served on the tenant, that *the landlord may by leave of the Court make himself defendant with the tenant in possession*, in case he appears: but in case the tenant will not appear, judgment shall be signed against the casual ejector. But upon the landlord's entering into the common rule, as the tenant ought to have done, the Court will order a stay of execution upon such judgment till further orders."

Under this statute it has been resolved,

1st. "That the landlord has under the statute *a right* to be made a defendant, if he applies; but it is optional in him to do so or not."

For where the *plaintiff moved*, that the landlord might be joined as a co-defendant with the tenant in possession, the court refused the motion, on the ground that they could not do it without his request.

Underhill v.
Durham.
Salk. 256.

And in another case, where the landlord moved to be made a defendant, the plaintiff opposed it, on the ground that the landlord was a member of parliament; but per *Holt*, he must be joined; and we cannot compel him to waive his privilege.

Ibid.

2d. "No one can be admitted as a defendant under the statute, unless he is the *actual landlord*, or one who has been in possession; for this might encourage maintenance."

* Therefore where a man devised his estate to *J. S.*, and the heir brought his action of ejectment against the tenant, *J. S. (the devisee)* applied to be admitted a defendant, and was refused, for he was not the actual landlord.

Roe ex dem.
Leake v. Doe.
Mich. 29 G. 2.
C. B.
Buller N. P. 95.

But * [453]

Lovetlock ex
dim. Morris v.
Doncaster.
4 Term Rep.

122.
and 3 Term Rep.
783.

Jones ex dim.
Woodward v.
Williams.
Trin. 13 G. 2.
Buller N. P. 95.
1 Barnes, 122.

But the Court permitted a *devisee in trust* to defend in ejectment as landlord under the stat. 11 Geo. 2. though they would not allow *cestui que trust* himself.

So a *mortgagee*, who had never been in possession or received the rents, has been refused to be made a defendant.

And in cases of *vacant possession* no person claiming title will be let in to defend; but he that can first seal a lease on the premises must obtain possession.

"And this rule was made to prevent *mere strangers* from being admitted as defendants."

Doe ex dim.
James v. Roe.
Hil. 1761.
quot. 3 Burr.
1291.

Fairclaim ex
dim. Fowler v.
Shamtitle.
3 Burr. 1290.
1 Black. Rep.
357. S. C.

Therefore a *purchaser of a reversion*, which seemed to be a pretended title, and where no rent had ever been paid, was held to be inadmissible as a defendant."

But in this case, which was a disputed title between the lord by *escheat* and the heir, neither of whom had been in possession, the Court resolved, That the title should be tried, and ordered the ejectment to be brought by the lord by *escheat*; and that the heir should be admitted to defend either alone, or with the tenant in possession.

Goodright
v. Rich.
7 T. Rep. 331.
Smith ex dim.
Taylor v. Mann.
1 Will. 220.
Buller N. P. 10.
S. C.

4. Though the defendant confesses lease, entry, and ouster, yet he may deny that he is in possession of the premises, for which the plaintiff goes and puts the plaintiff upon proving it; and if he cannot, he shall be nonsuited.

And where the landlord has been admitted as defendant, the plaintiff must prove that the defendant or his tenant are in possession of the premises in question. For the rule is, That the landlord shall defend for the premises only, whereof his tenants are in possession; and the party does not admit himself landlord of any premises which the plaintiff may make title to, but to such only as were in possession of his tenants.

Doe ex dim.
Jeffe v. Bacchus.
M. 30 G. 2. at
Sittings. Buller
N. P. 110.

But it has been said, that if there be but one defendant as tenant in possession, that the plaintiff need not prove him in possession; because if he was not, why did he enter into the rule.

Fenwick's case.
Salk. 257.

So it is said in this case, that where the husband is lessor of the plaintiff, that the wife may be made a defendant in ejectment. As where the plaintiff's title was by a pretended intermarriage, which was controverted.

[454]

2dly, I shall now consider more particularly certain *pleas* which are good in this action.

Alden's case.
5 Co. 105. a.

1. "That the lands for which the ejectment is brought are *ancient demesne*, is a good plea in abatement."

Barker v. Wick.
Salk. 56.

But the plea must state, that the lands are held of such a manor which is ancient demesne, not that *they are parcel* of the manor; for though the manor is ancient demesne, yet the

the manor and the demesnes of the manor are impleadable in the king's courts and at common law, and not in the lord's courts, for that would be to make the lord judge in his own cause. But lands *held of a manor* which is ancient demesne, are impleadable in the court of ancient demesne, and there only, *F. N. B. 11 m. 1 Roll. 324.*

Therefore if the lands are *copyhold* and ancient demesne, the ejectment for them must be tried at common law; for copyhold lands cannot be *held of a manor*, but must be *parcel of it*. *Brittle v. Dade. Salk. 185.*

"So the plea should state the *manor to be ancient demesne.*"

For where in this case the affidavit on which the plea was grounded, only stated, "That the lands stated in the declaration were ancient demesne, and held of the manor of *Godmancheffer*," without saying that the manor was ancient demesne, it was adjudged to be bad and insufficient: for this plea being to oust the courts above of jurisdiction, it can only be done by shewing another which has, and that is by stating the manor to be ancient demesne. Besides, the estate of the lessor of the plaintiff should appear; for if he has only a *term*, he cannot sue in the courts of *ancient demesne*. *Doe ex dim. Rust v. Roe. 2 Burr. 1046.*

But this being a dilatory plea to the jurisdiction of the court, must always be verified by affidavit. *Hatch v. Cannon. 3 Willf. 51.*

2. If the plaintiff after issue, and before trial, *enters into part of the lands in dispute*, the defendant may at the assizes plead this as a plea *puis darrein continuance*, in bar of plaintiff's action: but it is at the discretion of the judges if they will admit it; but if they do, it stops the trial, and the plaintiff is not to reply to it at the assizes, but the judge is to return it as parcel of the record of *Nisi Prius*. *Moor v. Hawkins. Yelv. 180.*

3. *Accord and satisfaction* is a good plea in ejectment.

For ejectment supposes a trespass; and they are so interwoven, that they cannot be severed: and in all actions which suppose a wrong *vi et armis*, and where a *capias* and exigent lay, accord is a good plea. *Henry Peytoe's case. 9 Co. 77. b. Brownl. 128. S. C.*

* 4. General estates in fee-simple may be generally pleaded, but the commencement of estates-tail, and other particular estates, ought to be shewn, unless where alleged only by way of inducement. So the life of tenant in tail or for life ought to be averred. *Co. Litt. 303. b.*

As where to trespass for spoiling plaintiff's grass, defendant justified and derived his title under one *Knight, who was lawfully entitled to the remainder of a term for ninety-nine years*, without saying any thing more, or how derived out of the fee: the plea on special demurrer was held to be bad. *John's v. Whitley. 3 Willf. 65. Scilly v. Dally. Salk. 562. S. P.*

So

* [455]

Shepherd's case.
Cro. Car. 190.

So no one can in pleading make title to a copyhold, unless he shews a grant thereof; it is not sufficient to say, "that such a one was seised in fee, or in tail," &c.

Anon.
Salk. 516.

Note; If judgment in ejectment be signed in a country cause for want of a plea, but no possession delivered, a judge at his chambers, at any time before the assizes, may compel the plaintiff to accept of a plea; but if possession has been delivered, he is without remedy.

5. OF THE EVIDENCE.

As in this action each party claims a *title* to the lands, I shall consider together

THE EVIDENCE FOR THE PLAINTIFF AND DEFENDANT.

1. "In ejectment the plaintiff must recover by the strength of his own title, not by the weakness of his adversary's, for whom possession is a good title. The plaintiff must therefore always shew *a good and sufficient title in himself*, or he cannot recover."

Roe ex dim.
Haldane and
Urry v. Harvey.
4 Burr. 2484.

Therefore where in an ejectment under two several demises, a title was proved in one of the lessors of the plaintiff (Mrs. Haldane), but a witness for the plaintiff proved that *she had assigned all her interest in the premises to the other* by a deed then in court; but the plaintiffs refused to produce this deed, upon which a nonsuit took place; for by this evidence all title was taken away from one of the lessors of the plaintiff, and there was no proof of the conveyance to the other, and so no proof of any title in him.

Bull. N. P. 110.

"So that it will be sufficient for the defendant in ejectment to prove *a title out of the lessor of the plaintiff*, though he can prove no title in himself."

Doe ex dim.
Crisp v. Barber.
2 T. Rep. 749.

* [456]

* As where the lessor of the plaintiff claimed under a demise of the rectory-house, &c. from the rector for 21 years, and the defendant had entered on him without any colour of title whatever, the defendant at the trial relied on the lease being void under stat. 13 Eliz. c. 20. by reason of the non-residence of the rector, he having been absent for more than 80 days within the year, which fact was proved; it was decided, That by the words of the statute, the lease being declared to be *void*, the lessor of the plaintiff had no title, and so could not recover, though the defendant had no colour of title, and was a stranger and a wrong-doer.

— ex dim.
Brookholding v.
Baldwin.
Worcester Sum.
Ass. 1759. MSS.

So in ejectment for a moiety of an *Inn* at *Bewdley*, which was copyhold, the plaintiff relied for his title only on payment of rent, which had been uniformly paid to him for forty years, twenty-eight years by the defendant's husband in her right, and twelve years by the defendant herself; the

counsel

counsel for the defendant offered to prove that the premises had been entailed by an old surrender to her father for life, with remainder over; and that the father, though only tenant for life, had made a lease for 500 years in trust, as to one moiety for the persons under whom the plaintiff claimed, and as to the other moiety in trust for her; that the rent had been paid by the defendant, supposing the lease was good, which in fact was void since the father's death. It was objected, for the plaintiff, that this evidence was inadmissible; 1st, Because payment of rent was conclusive evidence against the defendant, that she could not set up a title in herself, but should have let the plaintiff into possession, and then have brought her ejectment: 2dly, That she was barred by the statute of limitations. But Baron Adams over-ruled both objections; holding, 1st, That ejectment being an action to try the title, the defendant was at liberty to set up a title in herself: 3dly, That the holding being as a tenancy in common, the defendant was never out of possession, and so that the statute did not attach, and relied on *Reading v. Rayston*, Salk. 242.

So where the lessor of the plaintiff held a lease of the premises for which the ejectment was brought, for twenty-one years, and the defendant was his under-lessee: it was resolved, That in ejectment for these premises, the defendant might shew *that his landlord's term was expired*.

England ex dim.
Syburn v. Slade.
4 T. Rep. 682.

" But if he proves a title out of the lessor of the plaintiff, it must be a good and a subsisting one elsewhere; a supposed title in another will not be sufficient."

As if the defendant was to produce an old lease of one thousand years to another of the lands in question; that alone would not be sufficient, *unless he proved possession under such lease* within twenty years.

Bull. N. P. 110.
[457]

So in ejectment by the second mortgagee against the mortgagor, he shall not give in evidence the title of the first mortgagee in bar of the second, for he is barred to aver against his own act, that he had nothing in land when he made the second mortgage.

Lindsey v. Lindsey.
Bull. N. P. 110.

So if the defendant produces an old mortgage-deed, whereon interest has not been paid, nor mortgagee entered, against the title of the lessor of the plaintiff, who claims under the mortgagor, this will not be sufficient to defeat the lessor of the plaintiff; because that no interest appearing to be paid, the Court will presume that the mortgage was satisfied: but if the defendant can prove payment of interest upon such mortgage after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.

Wilson v. Witherby.
8 Ann. in Kent,
per Holt.
Bull. N. P. 110.

So where the defendant produced a mortgage-deed for years of the ancestor of the lessor of the plaintiff, upon which

Farmer ex dim. Earl v. Rogers.
2 Will. 26.
Bull. N. P. 110.
S. C.

which was this indorsement, "Received 30th of *March* " (being after the day limited in the proviso) from Mrs. *M. O.* " 500*l.* on the within written mortgage; and I do hereby " release to the said *M. O.* and discharge the mortgaged " premises of the said term of five hundred years;" the ejectment was brought by the heir at law against the defendant, who had got the mortgage-deeds in his hands, and was in possession. At the trial he produced the above mortgage-deed, and insisted that the mortgage term was still subsisting, and that the possession was sufficient against the plaintiff, who must recover by the strength of his own case. To prove the term subsisting, the defendant relied that the term being created by deed, could only be surrendered by deed, which here was not the case, and that the payment being after the day limited in the proviso of the mortgage-deed, that the legal estate was still in the mortgagee: but on a case reserved, the Court were of opinion, 1st, That these words amounted to a surrender: 2dly, That such surrender might be by note in writing, within the statute of frauds; for under the statute, any term of years may be created by writing without deed, and the same be surrendered by deed or note in writing: and 3dly, That such note in writing was not required to be stamped. The Court therefore held, That the defendant shewed no subsisting title against the lessor of the plaintiff under this deed; and the plaintiff therefore recovered.

Buller N.P. 112.

[458]

Douglass 665.

" And though lessor of the plaintiff in ejectment must " shew a good and subsisting title in himself; yet in the case " of *Lade, Bart. v. Holford, Pasch. 3 Geo. 3. B. R. Ld.* " *Mansfield* declared that he and many of the judges had " resolved never to suffer a plaintiff in ejectment to be non- " suited, by a term standing out in his own trustee, or by setting " up of a satisfied term by the mortgagee against the mortgagor; " but that he would direct the jury to presume it to have " been surrendered."

Doe ex dim.
Bowerman v.
Sybourn.
7 Term Rep. 2.

Therefore where to an action of ejectment the defendant set up a lease made to him by one *J. Pym*, which term was then subsisting, dated 16th *October* 1789, for 81 years. Against this it was objected on the part of the plaintiff, That it did not appear that *J. Pym* had at that time the legal estate in him; but that it was at that time outstanding in his trustee, without whose concurrence no legal title could be made; and the plaintiff's counsel offered in evidence a bill in Chancery, filed by the present defendant and *John Pym* against *Bowerman* and *H. Holt*, the surviving and only trustee in *J. Pym's* father's will, praying, among other things, a conveyance of the legal estate to the said *J. Pym*, (the trusts in *J. Pym's* father's will being to the use of *J. Pym*, and to convey the same to him on his attaining the age of 21 years,) which bill had afterwards been dismissed. Lord *Kenyon* rejected the evidence of the bill at the trial, and ruled, that the jury

jury might presume that a legal conveyance had taken place from the trustees to *J. Pym* on his coming of age, pursuant to the trust; so that he had the legal estate in him at the time of making the lease. The plaintiff submitted to a nonsuit. Afterwards, on a motion for a new trial, the Court concurred with Lord *Kenyon*, and refused a rule to set aside the nonsuit.

“ So it has been held, that where a legal term is created for a particular purpose, if that purpose is satisfied, or if *unsatisfied, not interfering with the contesting parties*, it shall not be set up against the lessor of the plaintiff.”

For where an ejectment was brought for a moiety of the manor of *Winkburn*, under the will of Dr. *Burnell* as one of his coheirs. By the testator's marriage-settlement *A. D.* 1748, two terms had been created, one for ninety-nine years to secure an annuity of 200*l. per ann.* to the testator's mother; the other of 1000 years to raise 2000*l.* for his wife in case she had no issue. The testator died in 1774, leaving no issue, and by his will devised all his estates to trustees in trust after the death of his wife, for such persons as according to the laws of descent should be his heirs at law. The defendant in 1776 had been found heir at law in consequence of an issue out of *Chancery*, as descended from a daughter of a common ancestor, and was in possession; the lessor of the plaintiff claimed as heir at law, by descent from another sister of the same ancestor, and brought his ejectment for the moiety, *and did not mean to disturb the terms above created*: the defendant set up these terms against him: but it was adjudged, That as the plaintiff went to recover the lands, *subject to the uses of the subsisting term*, that this term should never be set up by a third person.

Doe ex dem.
Bristowe v.
Pegge.
1 Term Rep.
758.

“ But by a later determination, this has been altered; and the law is now held to be otherwise.”

This was the case of *Doe ex dem. Hodgson v. Staple.* 2 *Term Rep.* 684. In which case it was resolved, That as the plaintiff in ejectment must recover by virtue of a legal title, a satisfied term might be presumed to be surrendered; but an unsatisfied term, raised for particular purposes (as for securing an annuity, *ex. gr.*), might be set up as a bar, even though the party had otherwise good title, *and claimed subject to the charge.*

2. “ Where several matters are necessary to give a complete title, the plaintiff must prove all those requisites.”

Therefore where in an ejectment for a rectory, the plaintiff proved the *taking of the tithes* only, but not an entry into the glebe, he was nonsuited.

Harris v. Stroud.
Latch 62.

For if an ejectment is brought for a rectory, the plaintiff ought to prove that his lessor was *admitted, instituted, and inducted,*

Snow v. Phillips.
1 Sid. 220.

ducted, and had read and subscribed the thirty-nine articles, and had declared his assent and consent to all things contained in the Book of Common Prayer. But he need not prove a title in his patron; for institution on the presentation of a stranger is sufficient to bar him, who has right in ejectment, and put the right-ful patron to his quare impedit.

Heath v. Prynn.
1 Vent. 14.
1 Sid. 426. S. C.

So he must also prove *presentation*; and institution alone is not sufficient evidence of presentation, though it was recited in the letters of presentation, especially if induction and possession has not followed.

Buller N.P. 105.

* But, *quare*, if proof of a *verbal presentation* would not be sufficient?

* [459]

“ But reasonable presumption is admissible in favour of a “ title.”

England ex dim.
Syburn v. Slade.
4 Term Rep.
682.

As in an ejectment for an inn at *Lewisham* in *Kent*, the defendant having proved that the first title set up by the lessor of the plaintiff was at an end, he being a lessee under one *George Pym*; another lease was offered in evidence made to the lessor of the plaintiff, by one *John Pym*, who claimed under the will of *George Pym*, who thereby gave the estate in question to trustees, in *trust for John Pym, and to convey the same to him when he attained the age of twenty-one years*: this age he had attained three years before, but *there was no conveyance from the trustees to John Pym* given in evidence: for this, Just. Gould nonsuited the plaintiff. On a motion for a new trial, the Court set the nonsuit aside, holding, *that, it might be presumed that the trustees had done their duty in making the conveyance when John Pym came of age, and that a jury might be directed to presume a conveyance or surrender in much less time than twenty years.*

Earl ex dim.
Goodwin v.
Baxter.
2 Blackst. Rep.
1228.

So where in an ejectment for the residue of a term, created the 5th of *Elizabeth*, the plaintiff produced the original lease, and proved possession in himself, and those under whom he claimed, since 6th of *Ann.* and proved one mesne assignment in the 16 *Jac.* 1.; the plaintiff was nonsuited at the trial for want of proving all the assignments, it being supposed to be necessary for him to prove every step of his title, and so the mesne assignments; but the Court set the nonsuit aside, holding that *mesne assignments should be presumed after so long a possession.*

3. “ This being an action of trespass, every part of the “ declaration must be proved.”

Body v. Smith.
1 Stra. 595.

For where the plaintiff declared in ejectment for an house in *Peter's-street* and *Ward of Cheap*, and the defendant proved that the house was in the *Ward of Farringdon*, and that no part of *Peter's-street* was in the *Ward of Cheap*, the plaintiff was nonsuited.

“ But

" But if the plaintiff declares on a lease of a certain date,
 " though his proof does not establish that lease as declared
 " on, yet if he proves a good and subsisting lease at the time,
 " it shall be sufficient."

As where the declaration was on a lease made the 14th of January, 30 of Eliz. and the evidence was a lease sealed the 13th of the same year, the evidence was held to be good, for if it was a lease sealed the 13th, it was a good lease on the 14th.

Force v. Foster.
 4 Leon. 14.

* 4. " Leases at will exist now only notionally; and now
 " all leases are deemed to be from year to year, and cannot
 " be determined without reasonable notice, which may be
 " done by either party."

Per Lord Mansfield.
 3 Burr. 1609.
 * [460]

All leases for uncertain terms are *prima facie* leases at will, and it is the reservation of an annual rent that turns them into leases from year to year; it is possible that circumstances may make them leases for a longer time, as where the crop (liquorice or madder, for example) does not come to perfection in less than two years; and perhaps the nature of the ground and course of husbandry may deserve to be considered.

Per De Grey,
 C. J.
 2 Blackst. Rep.
 1173.

But though a custom is proved to exist where the lands lie, that *where any part of the lands are open fields*, that that shall give the tenant a right to hold for three years; yet where there is an indeterminate taking, this custom shall not control it: the rule now laid down for such an indeterminate demise is always a taking from year to year, and the custom is unreasonable; for so by the tenant's having one acre of common field, might he determine the tenure of one hundred acres held in severalty.

Roe ex dem. Bree
 v. Lees.
 2 Black. Rep.
 1171.

And even where an infant becomes entitled to the reversion of an estate, or demises it himself reserving rent, he cannot recover the possession by ejectment, without giving the regular notice.

Maddon v.
 White.
 2 Term Rep.
 159.

So where there was an agreement for a lease made by the lessor of the plaintiff for her own life, but a clause in it that *her son* (who was then an infant) *should have a power to take the house himself, when he came of age*, it was adjudged, That under this agreement, the son, on his attaining his age of twenty-one, *should signify his intention in a reasonable time*, and that where he did not do so for a year, and then gave notice to the tenant to quit, that the tenant could not on such notice be evicted.

Doe ex dem.
 Bromfield v.
 Smith. 2 Term
 Rep. 436.

2. As to the *time of the notice*, it is settled that

Wherever therefore the landlord brings ejectment for lands so demised at will, he must prove "*That half a year's previous notice was given to the tenant to quit, or to his executor, in case of his death,*" or the plaintiff shall be nonsuited at the trial.

Parker ex dem.
 Walker v. Con-
 stable.
 3 Will. 25.

Goodtitle v.
Muslewhite.
Exon Sum. Aff.
1783. MSS.

[461]

Doe ex dim.
Dagget v.
Snowden.
2 Black. Rep.
1224.

But where the notice was given on the 30th of September, being the day after Michaelmas-day, to quit at Lady-day following, Justice Heath ruled the notice sufficient.

“ And so the course of husbandry, and the custom of the country, has admitted some relaxation as to the precise time required.”

As where the ejectment was for lands on the following case. On the 5th of October 1769, by written memorandum, the plaintiff agreed to let to the defendant a farm at Newsham, to hold the arable land from the 13th of February following; the pasture from the 5th of April, and the meadow-ground from the 12th of May, for seven years at 26l. per annum rent, payable at Michaelmas and Lady-day, the defendant to have a waygoing crop; the defendant continued tenant till the end of the term. On the 30th of September 1777, the plaintiff gave a written notice to quit the arable land on the 13th of February, the pasture on the 5th of April, and the meadow on the 12th of May following: and the question was, if this was a sufficient notice? it being insisted on for the defendant, that the notice should have been given the 13th of August, which would have been six complete months before the first day of quitting. But per Cur. the six months notice to quit is required by law, except where any special agreement, or the custom of particular places intervenes, the true construction of this agreement is an holding from Lady-day to Lady-day, the rent is so reserved; and though part of the farm is to be entered on, and quitted the 13th of February, it is no more than the custom of most countries would have directed without any special words, on a taking from Lady-day to Lady-day, that being the time when the land is to be prepared for lent-corn; and as the tenant outgoing has the benefit of the waygoing crop, any inconvenience to him is obviated, whereas great mischief might happen to landlords, if compelled to give a notice so early as August, as it would enable the tenant to harass the land.

Doe ex dim.
Parry v. Hazell.
Espin. N. P.
Cas. 94.

So it has been ruled, That the notice may have relation to the tenancy; so that, on a taking by the month, a month's notice to quit may be sufficient.

“ And the lessor cannot determine his will at any time, but must determine it at the end of the year.”

Right ex dim.
Flower v. Darby.
1 Term Rep.
159.

For the six months notice to quit must be given at the end and expiration of the first six months, so that the notice must be to quit at the end of the year..

Doe ex dim.
Rigge v. Bell.
5 Term Rep.
471.

But when the lessor leased for seven years by parol, (which demise was void by stat. of frauds,) “ to hold from old Lady-day and to quit at Candlemas,” and the lessor of the plaintiff conceiving that the lease being void, the tenant must be taken as a tenant at will holding from Lady-day, and accordingly gave six months notice to quit at that time, the notice

notice was held to be bad: and it was resolved, that though the lease was void, that the holding was to be deemed as under the agreement, and so that the notice should have been to quit at *Candlemas*.

" It has been ruled at *Nisi Prius*, That where notice to quit has been served on the tenant, and the landlord being ignorant of the time when the tenancy commenced, has given the notice to quit at the wrong time; that is, not, at the end of the year; *that the tenant* when the notice is served ought to inform the landlord of his error, and inform him of the true time."

* But in this case, where the defendant held from *Michaelmas*, and the notice to quit was at *Midsummer*, on receiving the notice, he made no objection as to the time, but said " I pay rent enough already, and it is hard to use me thus:" the judge refused to nonsuit the plaintiff at the trial, holding that the defendant had waived the objection as to the time of the notice, by not objecting to it at the time, and the plaintiff had a verdict; but it was set aside, the Court being of opinion, That the objection was not waived, but that the defendant might avail himself of it at the trial.

Oakapple v. Copous.
4 Term Rep.
361.

*[462]

" But there may be a waiver of the regular notice."

As where three months only was given by the tenant, and the lessor neither expressed an assent or dissent to the admitting it, and took the rent up to the time when the tenant quitted, Lord *Kenyon* said that it should be taken as a waiver of the regular notice to quit, and an acquiescence on the part of the lessor.

Shirley v. Newman. Espin.
Caf. N. P. 266.

3. " As to the *form* of the notice, it must be positive, and not leave an option in the tenant to quit, or to hold over on certain terms."

The notice served on the tenant was in writing, and in the following words: " I desire you to quit possession on *Lady-day* next, or I shall insist upon double rent:" it was insisted that this was not a good notice, as not being positive, but leaving an option in the tenant to pay the double rent; but the Court held it to be sufficiently positive, and that the latter words only were added by way of threat of the consequence of holding over the possession; but that had the words been " or else that you agree to pay double rent," there the tenant would have had an option, and the notice not have been sufficient.

Doe ex dim.
Matthews v. Jackson.
Douglas 167.

4. As to the *service of the notice*, it was decided, That where the service of the notice to quit was on a maid-servant in the defendant's house, to whom it was delivered, and the contents of it explained, but there was no evidence of its having come to the defendant's hands, and the house was not on the demised premises, the Court held this a good and sufficient

Jones ex dim.
Griffiths v. Marsh.
4 Term Rep.
464.

service; for the servant who was in the power of the defendant, might have been called to prove that she had not delivered it to her master; but not being so, it was presumptive proof that he had received it.

Throgmorton
v. Whelpdale.
Hil. 9 G. 3.
B. R.
Buller N. P. 96.

5. In what *case notice is unnecessary*. 1. This is the case where the tenant has attorned to some other person, or done some other act, *disclaiming to hold as tenant to the landlord*: in such case no notice is necessary.

Goodright ex
dim. Morgan
v. Shirley.
Gloucester Lent
Ass. 1765 MSS.

[463]

As where the ejectment was for the long-room in *Bristol*, the lessor of the plaintiff claimed under a lease from a Mr. *Vernon*, granted in 1762: the defendants had been in possession three or four years before the granting of this lease, and continued to the bringing of the ejectment: the defendants insisted that they had never attorned or acknowledged *Morgan* (the lessor of the plaintiff) as lessor; and if they had, that they ought to have had a notice to quit: but *per Wilmot*, Just. as the defendants have never allowed the right of *Morgan*, but disclaim the tenancy under him, notice cannot be necessary, and therefore having proved the right of *Vernon*, under whom *Morgan* claims a title to the premises, he has a right to recover without notice.

2. So in the case of leases made by mortgagors after the making of the mortgage (*ante*).

6. "It often happens that after a notice to quit has been regularly served on the tenant, that the landlord does some act which amounts to a *waiver of this notice*."

As to which it has been settled,

"That the mere *acceptance of rent*, after the time of the notice expired, unaccompanied by other circumstances, shall not be a waiver of the notice to quit."

Doe ex dim.
Cheney v.
Batten.
Cowp 243.

For where the lessor of the plaintiff served a regular notice on the defendant to quit at *Michaelmas*, and the defendant not quitting accordingly, he brought his ejectment, and laid the demise to the plaintiff on the 30th of *September*; the lessor afterwards, before the trial, which was in *Hilary* term following, *accepted the rent due from Michaelmas to Christmas*; this, it was insisted, being subsequent to the time when the defendant had notice to quit, was a waiver of the notice; but the Court were of opinion that it did not *of itself* amount to a waiver, but was proper evidence to be left to the jury, *quo animo* it was done: as it might be a *waiver only of the double rent*, to which lessor was entitled; or he might have taken it under the terms that it should not be a waiver of the notice.

Goodright ex
dim. Charter v.
Cordwent.
6 T. Rep. 219.

The law as to this point is now settled, that it shall be left to the jury to say whether it was received *as rent*, and if so, it is a waiver of the notice; but if accepted only as a satisfaction for the time occupied by the tenant, after the notice, such shall not be a waiver of the notice.

But where the ejectment was by a landlord against his tenant on a proviso for a re-entry for a forfeiture, it was held by the whole Court, that the lessor's bringing an action of covenant for half a year's rent subsequent to the time of the demise laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then subsisted: for *had the lease been at an end, it could not support an action of covenant*; and courts at law always lean against forfeitures.

Roe ex dim.
Crompton v.
Minshall.
Pasc. 33 G. 2.
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Buller N. P. 96.

And on the same ground, where the ejectment has been to recover lands demised, grounded on statute 4 Geo. 2. c. 28. for non-payment of rent, and no sufficient distress, acceptance of rent after the time of the demise laid, has been held to be a waiver of the right of recovery; for it is a penalty; and by accepting the rent the party waives the penalty.

Per Aston, Just.
Cowp. 247.

[464]

However, in this case, where by a covenant in the lease the lessee was bound to repair, and in case of not repairing within three months after notice, a right of entry was given; on the 18th of April the lessor gave notice of the want of repairs, which were not done, and of course his right of entry accrued the 18th of July following. The lessor accepted rent up to the Michaelmas following; and afterwards, on the 2d of November (the house being not then in repair) brought his ejectment. The receipt of rent subsequent to the forfeiture, was objected to by the defendant as a waiver of the forfeiture. It was ruled by Lord Kenyon, and afterwards confirmed by the Court, That if the demise in ejectment had been antecedent to the receipt of rent, that such would have been a waiver; but being subsequent to it, there was no reason why the lessor might not give an indulgence to the tenant, and bring his action subsequent to the receipt of the rent, particularly as the premises were not then repaired.

Fryatt v.
Jefferys.
Espin. N. P. Cas.
393.

5. "Where leases for life or years are void or voidable, possession is recovered of the lands demised by this action; but it often occurs in evidence, that the lessor may have barred his right of entry, and of recovery of the lands by some act affirming that which he might have avoided."

I shall therefore consider the cases that have occurred on this head.

1st. "Where a lease is absolutely void, nothing implied shall amount to a confirmation of it, or a waiver of the right of recovering the possession from the tenant, who derives his title under it."

Co. Litt. 215. b.

As where tenant for life made a greater lease than he could lawfully make, which of course was void; though he in remainder accepted the rent, after the death of the tenant for life, it was held not to confirm the lease, which was void *ab initio*.

Doe ex dim.
Simpson v.
Butcher.
Doug. 50.

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Doe ex dim.
Simpson v.
Butcher.
Doug. 50.

Goodright ex
dim. Wynne
v. Humphrys.
Dougl. 52.
In notis.

So where *Jane Lady Bulkley*, being tenant for life, with remainders over in tail to her sons and daughters successively, *with power to make leases for twenty-one years in remainder*, but not in reversion, intermarried with *Edward Williams*, who, without her concurrence, made a lease to the defendant *for ninety-nine years, determinable on three lives*, which was not within the power: *Edward Williams* died, having received the rent during his life: after his death *Lady Bulkley* received the rents, and granted receipts: she died, by which *Jane*, her eldest daughter, became tenant in tail, and suffered a recovery, having received the rent till her marriage with the lessor of the plaintiff, who also received the rents for some time after the marriage, and the counterpart of the lease was found in his possession; and notwithstanding those several acceptances of rent, the lease was adjudged to be void; for being void at its creation, nothing subsequent could establish it.

Fenkins ex dim.
Yate v. Church,
Cowp. 482.
S. P.

“ Therefore where the lessee has entered under a lease
“ for life or years, which turns out afterwards to be void,
“ it has been ruled, That though his entry has been lawful,
“ he shall not be deemed a tenant at will, nor be proceeded
“ against as such in ejectment.”

Goodtitle ex
dim. Adeane
v. Prentice.
Coram Gould,
Just. Surry Lent
Ass. 1790. MSS.

*[465]

For where in ejectment for lands in *Surry*, the case was, *Elizabeth Compton* being entitled to a copyhold of inheritance held of the manor of *Kennington*, was admitted to it * *A. D.* 1767: in 1780 Mr. *Compton* her husband granted a lease to *Mitchell* for forty years (under whom the defendant claimed) without the consent or the joining of his wife, and so contrary to stat. 32 *Hen. 8. c. 38.*: in 1782 Mrs. *Compton* died, leaving her husband and an only daughter (now the lessor of the plaintiff) her heir at law; Mr. *Compton* received the rent till the time of his death in 1788, and Mrs. *Adeane*, the lessor of the plaintiff, also received it after his death as reserved by the lease till 1789; when, on discovering that the lease was void under stat. 32 *Hen. 8.* and also not warranted by the custom of the manor, the present ejectment was brought without giving notice to quit. For the defendant, it was insisted that the lease was good, or at most only voidable, and confirmed by acceptance of rent by Mrs. *Adeane* the plaintiff; but if she had not confirmed the lease, that she had made it a tenancy from year to year, and so should have given notice to quit; but both points were over-ruled by the judge, and the plaintiff recovered.

“ But this must be taken to be the case, where there has been no receipt of rent by the person in remainder.”

Doe ex dim.
Martin v.
Watts.
7 Term Rep. 83.

For where there was tenant for life under a settlement, with power to make leases for twenty-one years in possession without fine, and at the best rent; and tenant in tail made a lease, not warranted by his power, and of course void; but after

his death the lessor of the plaintiff, who was in remainder, *received the rent* as reserved in the lease, supposing it to be a valid one: afterwards having discovered his error, he brought his ejectment without giving notice to the tenant to quit. He was nonsuited on the ground that notice was necessary; on a motion to set aside the nonsuit, the last case was cited for the plaintiff and over-ruled, the Court being of opinion, That the receipt of rent was an admission of tenancy, and that the defendant was entitled to notice to quit.

2d. "Where the lease is *voidable*, there some act is required by the party who has a right, to shew that he has taken advantage of his right: and as to what shall be deemed such act, and what a waiver of his right, it has been decided," Co. Litt. 211.

1. "That the acceptance of rent, after notice of forfeiture incurred, is a waiver of it."

The lease in question was with a condition, that if the lessee should grant, alien, or assign the premises without the assent of the lessor, that then the lessor might re-enter: the lessee assigned part, and the lessor *accepted rent after the assignment*, but it did not appear that he had notice of the assignment at the time: upon this it was resolved, 1st, That notice of the assignment was material and traversable, for the assignment might be made so near the day of payment of the rent, and so secretly, the lessor could not have knowledge of it, and so lessee would have advantage of his own fraud: 2dly, *But where the lessor has notice*, as if the right of re-entry be for non-payment of rent, which he must know, there the acceptance of rent before an entry waives the right of entry; so if he distrains for it, it waives the right of entry, for by distraining, he affirms the rent to have continuance. Pennant's case, 3 Co. 64.

"And it is so in all cases where lessor accepts rent after notice of a condition broken, which is to give him a right of entry: it shall be deemed a waiver of the forfeiture."

* For where in a lease to the defendant from the lessor of the plaintiff, the defendant covenanted "*not to assign or under-let* without licence from the lessor, under hand and seal first had and obtained:" the defendant did under-let several parts of the land; but it being proved that such *under-letting was well known to the lessor of the plaintiff, and that he had accepted rent afterwards*, it was adjudged to be clearly a waiver of his right of entry; and the defendant had judgment. Goodright ex dim. Walter v. Davids. Cowp. 803.

* [466]

So that in general where the lease is merely *voidable*, the acceptance of rent alone, *unaccompanied with other circumstances*, is not a confirmation: to make it so, it must be done *with a knowledge of the title at the time; or where the remainder-* Per Lord Mansfield. Cowp. 483. Neale v. Parkin. Espin. N. P. Cas. 229.

man lies by, and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant.

2. "But a difference is to be observed on the operations of the same words, when applied to leases for *life* or for *years*."

Pennant's case.
3 Co. 64. a.

If a condition is annexed to a *lease for years*, and that in case of a breach that then the *lease shall be void*, in such case, no acceptance of rent after a breach of the condition shall make the lease good, for it is void: but in the case of a *lease for life*, with a like condition, and *to be void* on the breach of it, acceptance of rent after the condition broken shall waive the forfeiture; for an estate of freehold cannot be avoided without an entry.

"But how far this must be an actual entry on the lands, seems not to be settled."

Little v. Heaton.
Salk. 259.

In this case it is decided, That where an ejectment is brought by the lessor against the lessee, on a condition of re-entry for non-payment of rent, proof of an actual entry and ouster is not necessary: but *Salkeld* makes a *quære*, if an actual entry is not necessary where it is requisite to complete the title of the lessor of the plaintiff? for, by the rule, the entry of the *nominal plaintiff only* is confessed; it confesses the lease, but does not admit the lessor of the plaintiff's right to make it.

6. In this action titles to lands arising under *wills* are tried,

These for the most part are cases brought by the heir at law against the devisee, or against the person who claims to be heir at law, on the ground of bastardy; or by a devisee claiming an estate under a will.

Doe ex dim.
Pulney v. Lady
Cavan
5 T. Rep. 569.

If leases are made by any tenant for life by virtue of any power given to him by will or settlement, which power of leasing is under certain conditions and restrictions, these must be strictly complied with:—For if the lease vary from them either in the interest demised or the rent reserved, *ex gr.* It shall be void against him in remainder, as in case where the tenant for life was empowered, 1st, to make leases in possession and not in reversion; and 2d, such as there was reserved a rent of three-fourths of their yearly value; and he made a lease for years when another for the same lands had twenty-six years to run, to take possession on its determination, and did not reserve three-fourths of the value, it was held to be void against him in remainder.

Roe ex dim.
Thorne v. Loyd.
2 Black. Rep.
1099.

*[467]

* But it is previously to be observed, that where a person brings an ejectment as heir at law, he must make out a regular pedigree from the ancestor under whom he claims; mere report of relationship, or supposition, are not sufficient; for if such evidence should be admitted, the estate might be carried

carried contrary to the rules of descent; as to the paternal instead of the maternal line for example.

In ejectments against devisees, or their heirs, the matter turns on the due execution of the will; on the testator's capacity to devise, or on the legality of the devise itself.

I. AS TO THE DUE EXECUTION OF THE WILL.

It is enacted by the statute of frauds, 29 Car. 2. c. 3. "That all devises of lands or tenements, devisable either by common law or statute, shall be in writing, and signed by the party devising the same, or by some other person in his presence, and by his express directions, and shall be attested by three or four credible witnesses, and subscribed by them in the presence of the devisor, otherwise such will shall be void, and of none effect."

Under this statute it is to be considered, 1st, To what estates it extends: 2d, What shall be a sufficient signing by the testator, and by the witnesses: 3d, Who are credible and sufficient witnesses within the statute: 4th, Of the effect and proof by them of the execution. And,

1st, To what Estates it extends.

1. The clause in the statute only extends to such estates as pass by the statute of wills, 34 & 35 H. 8. c. 5.; that is, only to *estates of inheritance*: therefore where the testator devised his copyhold estate by will, but the will was not attested by any witnesses, it was held to be sufficient to pass that estate, for that the statute of frauds did not extend to it.

Tuffnell v. Page.
2 Atk. 37.
Attorney Gen.
v. Barnes.
2 Vern. 598.
S. P.
Roe ex dim.
Gillman v.
Heyhoe.
2 Black. Rep.
1114. S. P.
Whitchurch v.
Whitchurch.
1 Stra. 620.

2. So this statute does not extend to devises of *terms of years*, for they would go to executors; and the statute never meant to take any thing out of their hands: and in this case where the mortgagee under a long term of years, and also entitled to a long term of years to attend the inheritance in the same lands, purchased the inheritance, and devised it from his heir at law, but the will was not duly attested; his having a term in the same lands, which did not require such attestation, was held not to take the will out of the statute, but that it was void under it.

* 3. Where a power is given to appoint the uses and trusts of lands given to trustees, a will appointing those uses and trusts must be executed with the same solemnities of three witnesses, &c. under the statute of frauds, as if the lands themselves were devised; for if allowed to be devised in a different manner from land, the statute would be nugatory; and though the power of appointing is by other writing of the nature of a will, it is the same.

Wagstaffe v.
Wagstaffe.
2 P. Wms. 258.
*[468]

4. So though the will is executed in a foreign country, yet if it is to operate to devise lands in England, it must be executed by three witnesses.

1 P. Wms. 741.
Coppin v.
Coppin.
2 P. Wms. 291.

2. What

2. What shall be a sufficient Signing by the Testator;
and what by the Witnesses.

Stonehouse v.

Evelyn.

3 P. Wms. 252.

Smith v.

Codron.

2 Vez. 455. S. P.

Per Lord Mans-
field.

3 Burr. 1775.

Peate v. Ougly.

Com. 197.

1. It is not necessary that the witnesses should see the testator sign; it is sufficient if the testator owns to the witnesses that it is his name which is subscribed to the will, and that they subscribe their names in his presence.

2. "It is not necessary that the witnesses should attest
" in the presence of each other; or that the testator should
" declare the instrument executed to be his will; or that the
" witnesses should attest every page, or sheet, or folio of it;
" or that they should know the contents of it; or that
" each sheet, folio, or page, should be particularly shewn
" to them."

Eond v. Seawell

& ux.

3 Burr. 1773.

And therefore where Sir Thomas Chitty made his will, consisting of *two sheets of paper*, all in his own hand-writing, and signed his name to each, and also made a codicil on a single sheet, which he signed; he then called in a person, shewed him the will in two sheets and the codicil, and said it was his will, and signed by him, and desired him to attest them, which he did: two other persons were then called in; to them he shewed the *last sheet* of his will and the codicil, which he sealed before them, and they attested them; but these witnesses *never saw the first sheet of the will, it was not produced to them; nor did any paper then lie on the table*: but after the testator's death both the sheets were found in the testator's bureau, wrapped up together with the codicil: the Court were of opinion, That if the first sheet *was in the room* when the two last witnesses signed, that the will was well executed, and that it was proper matter to be left to a jury, whether in fact it was so or not, though there seemed circumstances sufficient in the case to ground a presumption that the will was in the room at the time.

Carleton ex
dim. Griffin v.
Griffin.

1 Burr. 549.

[469]

So where the testator wrote a will, in which he devised a freehold estate, and signed it, but no witness then attested it: two years after, he added a codicil *on the same sheet of paper*, disposing of some personal property; and this was subscribed by three witnesses: it was determined that this signing had reference to the first devise, and that the whole was to be considered as one will attested properly, though made at different times.

3. "It is not necessary that the three witnesses should be
" all present together at the time that the testator executes
" his will."

Jones v. Lake.

1742. in B. R.

In not.

2 Atk. 176.

For where it was found by a special verdict in ejectment, that the testator signed and executed his will in *December 1735*, in the presence of *two* witnesses, who attested the same in his presence, and that afterwards in the year 1739, that he went over his name with a pen in presence of another

other witnesses, who attested it at the testator's request: *Lee, C. J.* and the Court were of opinion, That the will was well executed, and that it was not required by the statute of frauds that the *witnesses should all be present at the same time.*

4. "But where the attestation is by witnesses at different times, the testator *must do some act of execution, or acknowledge the signature of his name* in the presence of each."

For where the testatrix executed her will, in the presence of two witnesses, and afterwards in the presence of a third, said, "This is my will," and desired he would attest it; but did not say that the name subscribed was her handwriting, or put her seal on it; Lord *Hardwicke* was inclined to think that this was not a sufficient execution of the will by the testatrix under the statute. *Gryle v. Gryle. 2 Atk. 176.*

5. "So where the witnesses attest the will separately, it must be the same will or instrument which they attest; for their attestations to different papers shall not be put together, so as to make a good attestation."

For where the testator made his will in writing, subscribed by two witnesses, and devised all his lands to *W. R.* and afterwards made a codicil, in which the will was recited; and this was also attested by two witnesses, one of which had been a witness to the will, but the other was a new one: the question was, if this was a sufficient attestation of the will by *three witnesses* under the statute? and the Court held that it was not. *Lea v. Libb. Carth. 35. Show. 69. 82. S. C.*

So where the testator had made his will, but not witnessed, and afterwards made a codicil, which he expressed to be *a codicil to his last will*, this was executed by three witnesses; it was held not to be a sufficient attestation of the will, it not appearing to have been produced when the codicil was signed. *Attorney Gen. v. Barnes. Gilb. Eq. Rep. 5. [470]*

6. It was formerly an opinion, that *sealing* a will by a testator was a sufficient signing within the statute (*Warnford v. Warnford, 2 Str. 764.*); but that doctrine has since been over-ruled, and the Courts have held that sealing without signing is not a sufficient execution of a will. *Smith v. Evans. 1 Will. 313.*

But where the testator's will was written in his own hand, and began "*I John Stanley, &c.*" but his name was not subscribed to it, but the will was sealed; it was adjudged to be a good signing within the statute, which did not direct whether the signing was to be at the top or bottom of the will. *Lemayne v. Stanley. 3 Lev. 1. 3 Mod. 219. Salk. 603.*

EJECTMENT.

7. As to the attestation in the testator's presence.

1. "The statute required the will to be attested in the testator's presence, to prevent the obtruding another will in the place of the true one: it therefore is sufficient if the testator *might see* the witnesses sign it, it is not necessary that he should actually see them sign it; for then if a man should turn his back or look off, it would vitiate the will."

Shires v. Glasscock.
Salk. 688.

It therefore was in this case held to be a good execution and signing by the witnesses within the statute, where the testator desired the witnesses to go into another room, seven yards distant, to attest the will, in which there was a window broken, through which the testator might see them: so where the witnesses signed in the room with the testator, he being sick in bed, and the curtains drawn, yet was the execution good.

Casson v. Dade.
7 Brown's Rep.
99.

And in a more modern case this doctrine was recognized: where the testatrix having given instructions to her attorney to prepare her will, came to his office to execute it; but being asthmatic, and unable to bear the heat of the office, she went into her carriage, the witnesses attending her to it, and saw her sign it, and then they returned into the office to attest it: the question was, whether this was a proper attestation in the testatrix's presence: but it being proved that the carriage was put back to the office-window, through which it was sworn by a person in the carriage, that the testatrix might have seen the witnesses sign, Lord Chancellor *Thurlow* was of opinion, That the will was well executed.

[471]

"These cases go on the presumption that as the testator *might have seen the attestation*, that the Court will not presume that he did not; but where that presumption cannot be admitted, there the attestation should be deemed defective, and the will not properly executed."

Eccleston v. Petty.
Comb. 156.
Carth. 79.
S. C. called
Edlstone v.
Speake.
1 Show. 89.
Broderick v.
Broderick.
1 P. Wms. 239.
S. P.

For where in ejectment by the heir at law against the devisee, the plaintiff to destroy the will under which the defendant claimed, produced a subsequent will, attested by three witnesses, they proved the signing by the testator in their presence, but that they had signed not in the room with him, but in the hall, which was distant from the room where he was, and where he could not possibly see them sign; this was held to be not a sufficient attestation within the statute, and the will void, so that it could not revoke the first will.

Longford v. Eyre.
2 P. Wms. 740.
3 Ref.

2. And the bare subscribing of a will by the witnesses *in the same room with the testator*, does not necessarily imply it to be in the testator's presence: for it might be done clandestinely and fraudulently in a corner of the room, without his knowing what was doing; there should be some circumstances

cumstances to shew that the testator knew what was doing : as in this case *making a request* to the witness to sign the will was held to be sufficient.

“ For it is essentially necessary to the good attestation of a will, that it is executed with the testator’s knowledge.”

For where a will was drawn by the directions of the testator, and read over to him in the presence of the three witnesses, who afterwards subscribed it: he signed the two first sheets, and attempted to sign the third; but being unable from weakness, he said, “ *I cannot do it, but it is my will:*” when the witness returned again, *the testator was in a state of insensibility*, nevertheless the witnesses then subscribed their names, and he died in two days after: this was held not to be a sufficient attestation within the statute; for it could not be said to be executed in the presence of the testator, who was at that time void of perception and understanding.

Right ex dim.
Cater v. Price.
Dougl. 229.

3. And it is not necessary that the attestation should set out “ that the signing was in testator’s presence;” for where all the witnesses were dead, proof of their hands alone was held to be sufficient, though these words were wanting.

Croft v. Pawlett.
2 Stra. 1109.

3. Who are sufficient Witnesses within the Statute.

The witnesses must be *credible ones*.

Witnesses which are not credible ones within the statute, are such as are so, 1st, From being interested: 2dly, From crimes.

[472]

1. “ Where a person is to derive any benefit under the will, whereby he becomes interested in establishing it, he is an incompetent witness under the statute.”

As where the testator having devised his estate to the defendant and his heirs in tail, charged it with an annuity of 20l. *per ann.* to the wife of one *John Hailes*: the will was attested by three witnesses, one of whom was this *John Hailes*: it was adjudged, on ejectment brought for the lands devised, by the heir at law, That the benefit which *Hailes’s* wife was to derive under the will, was to be considered as a benefit to himself, and to render him an incompetent witness under the statute.

Holdfast ex dim.
Ansty v. Dowling.
2 Stra. 225.

“ For though one only of the witnesses is interested, and the other two might prove the will, yet that will not satisfy the statute, which requires that *each* should be free from interest.”

Which

Helier v.
Jennyngs.
1 Ld. Raym.
505.

Which was the case here, one of the witnesses to the will being the devisee of the lands contained in the will, which was therefore held to be void.

“ But as it often happened that a will being attested by
“ such persons as are usually attending on a person when
“ on his death-bed, as his apothecary, servants, &c., and
“ who had demands against the estate, as for medicines,
“ wages, &c., and so being creditors to the estate, were
“ incompetent witnesses under these decisions, though the
“ will was otherwise fair and well executed,” it was there-
fore enacted, by statute 25 Geo. 2. c. 6. “ That any person
“ who should attest the execution of any will or codicil, to
“ whom any beneficial devise, legacy, estate, interest, gift,
“ or appointment should be thereby given, (other than and
“ except charges on lands, tenements, and hereditaments,
“ for payment of debts,) such devise, legacy, &c., should,
“ as to such person, be utterly null and void, and such
“ person be a good witness to the will.”

“ By the 2d section of the same act, in case any lands,
“ tenements, or hereditaments, shall be charged with the
“ payment of debts, any creditor whose debt was so charged,
“ may nevertheless be a good and competent witness to the
“ execution of the will or codicil by which the charge has
“ been made.”

Wyndham v.
Chetwynd.
1 Burr. 414.

[473]

And accordingly the Court of *King's Bench* in this case, where the witnesses to the testator's will were two of them his attornies, and to whom he was indebted for business done; and the third his apothecary, to whom he was also indebted, held them to be good and sufficient witnesses to establish the will; though this case was decided on grounds independent of the statute, yet it seems to fall within it.

By the 3d section of the same act, a legatee who has been paid or has refused his legacy is a good witness.

Oxendon v.
Penrice.
Salk. 691.

But though interest incapacitates a witness, yet may a legatee be a witness *against* the will, for there he swears against his own interest.

2. A second incapacity to a witness is *for crimes*; “ in which case a witness so disqualified shall not be a sufficient witness within the statute.”

Pendock ex
dim. Mackender
v. Mackender.
2 Will. 18.

For where there were three witnesses, who regularly had attested the will, but one of them was a person who had been before the attestation *convicted of petty larceny*, and whipped, the Court held him to be an *incompetent witness*, as being *infamous* both by the crime and punishment; and the will was set aside for the want of *three credible witnesses*.

4. Of the Proof of the Execution by the Witnesses.

1. "The *execution* of the will may be proved by one witness, though it said that this is so only where no objection is made by the heir, as he has a right to have all "called."

Bull. N. P. 264.
Doe v. Smith.
Espin. N. P. Caf.
391.

For one witness may not only prove the executing of the will by the testator, and his own subscribing it in the presence of the testator, but likewise *that the other witness subscribed it* in the presence of the testator; which is a complete execution of the will.

Longford v.
Eyre.
1 P. Wms. 740.
2 Ref.

And though in this case one of the witnesses to the will would not swear that he saw the testator seal and publish the will, C. J. *Holt* was of opinion, That the will might be well proved notwithstanding, by proving such witness's hand, and that he set it to the will as a witness; for otherwise it would be in the power of a third person to defeat the will which he had attested.

Dayrell v.
Glascock.
Skinner 413.

"So if the witness swears *against* his own attestation, as "that the testator *did not* regularly execute his will, yet "this shall not of itself be sufficient to invalidate it; for "contrary testimony shall be admitted, on which the jury "shall decide."

For where in an issue out of *Chancery*, *deviseavit vel non*, for lands in *Worcestershire*, the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil, made four years after the will, all swore that the testator at the time of making his will and codicil was utterly incapable of transacting any business; and a dozen servants of the testator swore to the same effect: to encounter this evidence, the counsel for the devisee examined several of the nobility and principal gentry of *Worcester*, who frequently and familiarly conversed with Mr. *Joliffe*, the testator, during the whole period, and some on the day whereon the will was made; and also two eminent physicians, who occasionally attended him, and also the attorney who drew the will; all of whom strongly deposed the entire sanity, and more than common intellectual vigour of the devisor: on this evidence, though in direct contradiction to the testimony of the subscribing witnesses, the jury found a verdict in favour of the will.

Lowe v. Joliffe.
1 Bl. Rep. 365.

[474]

So where on a trial at bar on a devise, it was sworn by two of the witnesses, that the devisor had not published the will, for that another person had guided his hand, and the testator made his mark, but said nothing, nor was capable of saying any thing: in contradiction to this evidence it was proved, that the testator had made two former wills to the same

Hudson's case.
Skinner 79.

same effect as the present will, and that he died of a consumption, and continued sensible and conversed to his death: on this evidence a verdict was found to establish the will, it not being probable that a person who was sensible after the making of his will, would suffer his hand to be guided to sign that which he disapproved, and yet say nothing.

Goodtitle ex
dim. Alexander
v. Clayton.
4 Burr. 2224.

But it seems now that a witness should not be allowed to attest against his own signing; for where he was admitted, and a verdict found against the will, seemingly on the ground of the evidence given against the will by the witnesses to it, the Court granted a new trial.

2. Having considered the *execution* of the will by the testator and witnesses, it is necessary to take notice of certain other essentials to a valid will: that is, first, The capacity of the testator to make the will; and, secondly, The legality of the devise of itself; as a defect in either of these requisites render the will null and void.

2. OF THE CAPACITY OF THE TESTATOR TO MAKE A WILL.

Before the statute 32 H. 8. c. 1. lands in fee-simple were not devisable by will; and by that statute a power of devise was given to *all persons* who were seised in fee, &c.

Dyer 564. b.
*[475]

*But notwithstanding those general words, the courts did not construe it to give a power of devising to persons who could not make a good and legal conveyance in any other shape, and therefore held, That *femes covert*, *persons insane*, *infants*, or *persons under duress*, or *undue influence*, could not by will devise their lands.

As to infants, persons insane, and *femes covert*, their incapacity was afterwards declared by stat. 34 H. 8. c. 5., and as to persons under undue influence, or deceived to make a will by practice or fraud, that remains on the common law-footing.

1. As to Wills made by Infants.

Herbert v.
Torball.
1 Sid. 162.

1. If a person under the age of twenty-one years makes his will, and dies after he has attained that age, the will is void: but if he *publishes* it after he has attained his age of twenty-one years, such publication shall make the will valid and good.

Hawes v.
Burton.
Comb. 84.

But where a man under age made his will, and after full age he *declared* in the presence of several witnesses *that the will should stand good*; it was nevertheless held void, by reason that when first published, the testator was an infant; and this was no publication.

2. The

2. The day of the birth is exclusive; that is, if a person is born the first of *February*, at eleven at night, and the last day of *January*, in the twenty-first year of his age, at one o'clock in the morning, makes his will and dies, that is a good will to pass his lands, for he was then of full age. Anon. Salk. 44.

3. But *by custom*, an infant under twenty-one years may have a power of devising. Perk. 221.

But it is to be observed, that this incapacity to devise under the age of twenty-one years, extends only to cases of *estates in fee simple*; for *terms of years*, and *chattel-interests* may be devised by males at the age of *fourteen years*, and females of the age of *twelve*. Godolph. Orph. Leg. p. 1. ch. 8. 2 Vern. 104. 469.

2. As to Wills made by Persons of non-sane Memory.

These are either *Idiots* or *Lunatics*.

Idiots have no power of making a will, or disposing of their property; for by stat. 17 Ed. 2. c. 9. "The king shall have the profits of the lands of idiots, finding them necessary, and after their deaths shall render the estate to the heirs of such idiots, in order to prevent such idiots from aliening their lands, and their heirs from being disinherited." [476]

Persons deaf, dumb, and blind, come under this predicament of idiocy, as wanting those senses by which the mind is furnished with ideas. Co. Litt. 42.

Lunatics are also incapable of making a will; for any unsoundness of mind disqualifies the person from making a will: and it is not sufficient that the testator be of such understanding or memory when he makes his will, as to be able to answer common or familiar questions, but he should have a disposing memory; that is, such as would enable him to dispose of his lands with understanding and reason. Marquis of Winchester's case. 6 Co. 23.

3. As to Wills by Females Covert.

"A *feme* during coverture cannot make a will, nor the spiritual court grant probate of any such instrument: but in her marriage-settlement she may reserve a power of making a will, which shall operate as an appointment, and probate be granted of it." 1 Burr. 431.

And if the devise is of a chattel-interest, under a power reserved to the wife, the will cannot be given in evidence till probate has been granted by the ecclesiastical court. Stone v. Forsyth. Dougl. 681.

4. "Fraud, circumvention, or any improper practice, shall also avoid a will."

Bransby v.
Kerridge.
Bull. N. P. 266.

For though the devisee proves the will duly executed according to the statute, yet if the heir at law can prove any fraud in obtaining it, the jury should find against the will.

Webb v.
Claverden.
2 Atk. 424.

And it must be tried at law, for a court of equity will not interfere.

Per Buller, Just.
Goodright ex
dim. Farr v.
Atkyns.
Winton Sum.
Aff. 1789.

And where the ejectment is by the heir at law, to set aside the will, as obtained by fraud and imposition practised on the testator, the defendant shall not be permitted to call witnesses to his general good character.

Per Lord
Kenyon.
Stuttsbury v.
Smith.
Espin. Cas. N. P.
391.

And *note*, That in an ejectment against a devisee by the heir at law, the devisee is not bound to call *all* the subscribing witnesses: it will be sufficient to call one who saw the testator execute the will, and the other witnesses subscribe it in his presence.

3. OF THE LEGALITY OF THE DEVISE ITSELF.

Litt. f. 237.
Co. Litt. 185.

[477]

1. "If lands are held in *joint-tenancy*, one join-tenant "cannot by will devise or dispose of his moiety, but the "survivor shall have the whole by survivorship; for *by* the "death of one join-tenant the title of the other accrues, "but the title of the devisee, not till after the death of the "devisor."

Swift ex dim.
Neale v.
Roberts.
3 Burr. 1488.

And where a join-tenant during the existence of that estate made his will, and *afterwards severed the joint estate*, and made partition, it was adjudged, That the will being void at its creation, did not derive any validity by the subsequent partition, but that the surviving join-tenant was entitled to the moiety which testator intended should have passed by his will.

2. "All devises of lands in *mortmain* are declared to be "void by several statutes; as *Magna Charta*, stat. 7 *Ed. 1.* "stat. *West. 2. c. 13.* and others."

But under stat. 43 *Eliz. c. 4.* devises of lands to different corporations have been held to be good by the courts; as *appointments to charitable uses.*

And a restriction is now put on these by stat. 9 *Geo. 2. c. 36.* which enacts, "That no manors, lands, advowsons, " &c. or money in the funds, or to be laid out in lands, "shall be given to any bodies politic for charitable uses, "unless such gift be made by deed indented in the presence "of two credible witnesses twelve months before the death "of the donor, and enrolled in chancery within six months "after execution, or the stock be transferred within six "months before the death of the donor, and be to take effect "from the making, and be without power of revocation."

Doe ex dim.
Phillips v.
Aldridge.
4 T. Rep. 264.

In ejectment for an house and ground-belonging to it, by the heir at law against the devisee, the case was on the following

lowing devise of *Wm. Philips* "to *Adam Aldridge* (the defendant) now preacher of the meeting-house at *Lyndhurst*, all my (describing the premises) to hold for and during his natural life only, on this condition, that he shall without delay after my decease, settle and convey the same to trustees, to take place at his decease, *for the use and support of the preaching of the word of God at Lyndhurst, for ever,*" &c. &c. the Court held clearly, That though the *latter devise was void under stat. 9 Geo. 2.* yet that the life-estate to the defendant was good.

3. "But a will originally well made may be *revoked* or *cancelled*, and that either impliedly or expressly."

1. Of express Revocations, or cancelling of Wills.

1. It is enacted by the statute of frauds, 29 Car. 2. c. 3. "That no devise of lands, tenements, or hereditaments, which has been in writing, shall be *revocable* otherwise [478]
"than by some other *will or codicil in writing*, or other
"writing declaring the same; or by burning, cancelling, or
"tearing the same by the testator, or by some person in his
"presence, and by his directions. And if the former will
"is altered, or revoked by another, this last must be executed by the testator in the presence of three or four
"credible witnesses."

Under this statute it has been decided,

1. "That the *mere act of cancelling* a will is no revocation, Cowp. 52.
"it must be done *animo revocandi*; and any act done with
"intention to cancel, shall operate to effect it."

Therefore where a testator took a will which he had made, part he tore and threw it on the fire, *intending to destroy it*, but it fell off, and was saved without his knowledge; it was adjudged to be a sufficient cancelling of the will. Bibb ex dim. Mole & ux. v. Thomas. 2 Black. Rep. 1043.

2. "No will can operate to revoke a former good and valid will, unless the latter will be executed with all good and legal solemnities."

Therefore where a will was well made, and afterwards testator made another will, whereby he declared all former wills null and void, but this last was not duly executed, it was adjudged not to revoke the first will, which was good; for a good will cannot be revoked by a void one. Onyons v. Tyrer. 1 P. Wms. 843.

So where testator made his will of real and personal estates, and made two duplicates of it, one of which he kept in his own hands, and the other he delivered to *Limbrey*, the defendant. Before his death he altered in many respects the duplicate in his own possession, and greatly obliterated it, Mason v. Limbrey. Quot. 4 Burr. 2515.

it, and began to write over a new will, but never finished it; nor did he ever apply to *Limbrey* to get back his duplicate. It was adjudged, that the second will, being imperfect, was no revocation of the first, which should therefore be deemed the subsisting one, as evidently the testator did not mean to die intestate.

3. "Neither shall a good will be revoked by any subsequent one, unless it appears in what manner and in what points the revocation was made."

Hiarwood v.
Goodright,
Lessee of Rolph.
Cowp. 87.

[479]

For where on a special verdict the jury found, "That the testator had by will devised the premises in question to the plaintiff, and that he afterwards made *another will, properly attested, different from the former, but in what points they do not know*; but they did not find that he had cancelled his said last will, or destroyed it, but that what was become of it they were ignorant;" it was adjudged that this should not be deemed such a revocation as should take away the title of the plaintiff, which he had under the good will, but that it should be deemed valid and subsisting.

4. "But though a will has been revoked by a subsequent one, *but not destroyed*, if the subsequent will is afterwards cancelled, the first will shall be thereby established."

Goodright ex
dim. Glazier
v. Glazier.
4 Burr. 2512.

Testator having made a will in favour of the defendant; six years after made another will also in favour of the defendant. After testator's death both wills were found in his desk, but *the second will was cancelled*; it was resolved, that the first will was not revoked, for the second will being cancelled, it was as if it never had existed, and testator's intention appeared by both wills to be that defendant should take. And beside, the statute of frauds declaring, that where a former will is revoked by a subsequent one, and that the subsequent one should be a good one, and properly attested, and the second one here being a nullity, could not operate to revoke the first; which not being cancelled, must therefore stand.

"But where the first will is *itself cancelled*, and also revoked by a subsequent will, if this latter will is afterwards cancelled, yet it does not set up the first."

Burtonshaw
v. Gilbert.
Cowp. 49.

For where testator having made his will in two duplicates, delivered one to a friend to keep for him, and kept the other himself, he afterwards made another will different from the former, and revoking all former wills, and at the same time tore off his name and seal from the former will, and cancelled it: before his death he sent for an attorney to make a third will for him, but was senseless before he arrived. After his death the first and second wills were found together, and *both were cancelled*; but the duplicate of the first, which he had taken from the person with whom he had left it, was found

found among his papers *uncancelled*: it was resolved, 1st, That the cancelling of the copy in the testator's own possession cancelled the duplicate in the possession of the person to whom he had entrusted it; and 2dly, That the first will being itself cancelled, was not set up again by the cancelling of the second.

4. "And a will may be revoked by an act which is incomplete and void in law, if the testator's intention appears sufficiently that it was so to revoke the will; as by a feoffment *without livery*," &c. 3 Atk. 73.

So where the testator made his will, duly executed, and devised away all his real and personal estate to his brother, and he afterwards made a deed-poll, by which he gave all to his wife: though this deed was void, as a man cannot make a grant or conveyance to his wife in his lifetime, yet the chancellor (Lord Hardwicke) held, that it amounted to a revocation; but as it could not operate as a grant, that the person must be deemed to have died intestate. Beard v. Beard. 3 Atk. 72. [480]

2. Of implied Revocations.

1. The first of this description is *marriage* and the *birth of a child*; for these have been decided to amount to a revocation of a will made before the marriage had taken place. Christopher v. Christopher. Quot. Dougl. 35.

So marriage and the birth of a *posthumous child*, was in this case held to be a revocation of a will made before marriage. Doe ex dim. Lancashire v. Lancashire. 5 T. Rep. 49.

But these events shall only be deemed a revocation where the *whole estate* has been disposed of by the testator, and the children are left without a provision. Per Lord Mansfield. Dougl. 38.

And where such presumption does arise, yet may parol evidence be admitted to rebut the presumption, and shew that the testator did not intend to revoke the former devise: and a will which is revoked by such implication may nevertheless be republished by a subsequent instrument, properly attested, referring to it. Brady ex dim. Norris v. Cubitt. Dougl. 30.

2. A deed made subsequent to a will of lands, which was also the object of the deed, even if an inadequate conveyance for the purpose for which it was intended, if it appears that there was an intention to revoke the will, amounts in law to a revocation. As *ex gr.* if the deed was intended to operate as an appointment to uses, and was insufficient for that purpose, it shall operate to revoke a will, where an intention to revoke appears. Shove v. Pinck. 5 T. Rep. 124.

3. If a testator has a legal estate, devises it by will, and afterwards *suffers a recovery* of it, this shall be deemed a revocation: and it is the same if he executes any conveyance of the same effect, and takes back a new estate. But if he Per Lord Hardwicke in Parsons v. Freeman. 1 Will. 308.

EJECTMENT.

only leases for years, or lives, or mortgages to pay debts, these are only revocations *pro tanto*.

“ And the case is the same of an equitable estate.”

Per Lord Hard-
wicke, in
Parsons v.
Freeman.
1 Will. 308.

But if a man, having the equitable estate, devises it, and afterwards by legal conveyance takes the legal estate, it is no revocation: but where he obtains the legal estate *under different terms and conditions*, it is a revocation. As where being seised in fee of the equitable estate, he by fine and recovery took the legal estate, *but subject to the uses to be declared by him and his wife*.

Atk. 425.

So if a person devises a lease for life of which he is seised, and he afterwards purchases the reversion, this is a revocation *pro tanto*, and it goes to the heir.

5. In this action the question of *bastardy* often comes in question; the legitimacy of the reputed heir at law being questioned by the person who, in case there had been no issue of the deceased, would have been his heir.

1st, “ Though a man and woman have had a ceremony performed for the purpose of marriage, yet if that has not been regular, it is void, and the issue are bastards.”

[481]

To this effect it is enacted by stat. 26 Geo. 2. c. 33. “ That if any person shall solemnize matrimony in any other place than a *church or public chapel*, (except by *special licence* from the archbishop of *Canterbury*,) or without *publication of banns or licence* in a church or chapel, that the marriage shall be void. And further, That all marriages solemnized by licence, where either of the parties (not being a widow or widower) is under the age of twenty-one years, which shall be had *without the consent of parents and guardians*, shall be absolutely void.”

Bull. N.P. 113.

1. This act of parliament, requiring that all marriages shall be performed in a church or chapel, and with licence or publication of banns, *does not extend to marriages in Scotland or foreign parts*, nor to any marriages among any *sectaries*; as *Quakers, Jews, &c.*, whose marriages are good if solemnized according to their own rites, and both the parties are of the same persuasion.

2. “ Neither does that clause concerning the marriages of *persons under age*.”

Compton v.
Bearcroft. cor.
Deleg.
1 Dec. 1768.
Bull. N.P. 114.

For where in this case the appellant and respondent, being both *English* subjects, and the appellant under age, ran away without the consent of her guardian, and were *married in Scotland*: on a suit brought in the spiritual court to annul the marriage, it was held to be good.

Rex v. Preston
next Feverham.
Mich. 33 G. 2.
B. R.

3. The statute does not take away the evidence arising from cohabitation; though if the evidence be clear that the marriage

marriage was not celebrated according to the requisition of the act, it is totally void, and no declaratory sentence of the ecclesiastical court is necessary to annul it. The case here was, that the man was under the age of twenty-one years when he married.

Bull. N.P. 114.
Burr. Sett. Caf.
486. S. C.

Therefore in this case, where the father and mother of a pauper had cohabited together for thirty years as man and wife, and after the death of the wife, the husband was produced to prove that no marriage had ever actually taken place, which the sessions refused: on motion to quash the order of sessions, Lord *Mansfield* was of opinion, that thirty years cohabitation as man and wife was sufficient evidence to found an order of removal on; and the order of sessions was affirmed.

Stockland v.
Charland.
Burr. Sett. Caf.
508.

And note, That where there has been a sentence of the ecclesiastical court, in a suit *causa jactitationis maritagii*, that there was no marriage, and that the parties are free of one another; that that sentence, while unrepealed, is conclusive of the fact.

Jones v. Bgw.
Carth. 225.

2. By the same statute it is enacted, "That all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and shall be entered in the register; in which entry shall be expressed whether the marriage was celebrated by banns or licence, and signed by the minister and parties married, and attested by two witnesses."

[482]

"But if the marriage has been regularly solemnized, any subsequent irregularity in the entry shall not affect its validity."

For where a witness in this case proved, that he and another witness were present when a marriage was solemnized between *John* and *Susannah Meredith*, by the minister of the parish by banns, and an entry was produced from the parish book, viz. "1758, *John Meredith* and *Susannah Jenkins* were married by banns," but this entry was not signed by the minister, parties, or witnesses; it was contested that the marriage was not legally proved. *Per curiam*—In a suit of jactitation of marriage in the spiritual court, while the parties are alive, they are put to prove all ceremonies: but in all other cases proof by witnesses who saw the marriage, is *prima facie* sufficient; and whoever would impeach it must shew wherein it is irregular. Here the fact of the marriage is proved, and the register is not of the essence of the marriage, nor affects its validity.

St. Devereux
v. Much
Dewchurch.
Burr. Sett. Caf.
506.
Bull. N.P. 114.
S. C.

3. "Where no evidence can be had of the marriage having been solemnized, collateral proof, as from declarations or constant cohabitation, shall be sufficient."

May v. May.
Hil. 17 G. 2.
Bull. N. P. 112.

Therefore, where in this case the preamble of an act of parliament reciting that the plaintiff's father was not married, and to the truth of which he was proved to have sworn, was given in evidence, yet it being proved on the other side that there had been a constant cohabitation between the parties, and that the deceased had on all other occasions owned her as his wife, the plaintiff obtained a verdict.

"But that presumption shall only hold place where no positive evidence can be had; for in case proof of the marriage can be had, and that by the evidence even of the parties themselves, such shall be admissible and good."

St. Peter's,
Worcester, v.
Old Swinford.
Burr. Sett.
Case 25.
Bull. N. P. 112.
S. C.

[483]

For where on an appeal the case was stated, that *Joseph Heighington, father of the pauper*, gave in evidence, that for seven years he travelled about with *Hannah Aske*, during which time they cohabited as man and wife, but were never married, and that during that time the pauper was born and christened as the legitimate child of him and *Hannah Aske*: the evidence of the father was here held to be good and admissible to prove the fact of no marriage having ever taken place between the parties, though it went to bastardize his issue.

4. "But though a marriage has in fact legally taken place between the parties, yet may the issue born during its subsistence be bastards: as if the husband is proved to labour under any inability from any cause; or if there has been no access, &c., or the child be born out of time."

1st, In Cases of Inability in the Husband.

Exdim Lomax
v. Horden.
2 Stra. 940.

1st, Where in ejectment on a trial at bar, the question was, Whether the lessor of the plaintiff was the sole heir of *Caleb Lomax*, deceased? It was proved fully, that he was frequently in *London*, where his wife lived, so that access must be presumed. The defendants were admitted to give evidence of his inability, from a bad habit of body; but their evidence not going to an *impossibility*, but to an *improbability* only, that was not thought sufficient, and the plaintiff had a verdict.

Eury's case.
5 Co. 98. b.

So where a man had been divorced from his wife *causa frigiditatis et impotentiae*, and afterwards married again, and his second wife had issue; it was contended that they were bastards, by reason that the sentence of divorce established the question of his inability; so that all issue born after of his wife should be deemed bastards. But the Court held them legitimate; for the sentence did not establish a perpetual inability: and a man might be *habilis et inhabilis diversis temporibus*,

2d, In Cases where there has been no Access.

“Where it appears clearly in evidence that there *has been* no access, the issue shall be bastards.”

As where a married woman was brought to bed of a child during her husband's absence at *Cadiz*, and it was proved that he had not been in *England* from the time of conception to her delivery; the child was held clearly to be a bastard.

Rex v.
Abberton.
1 Ld. Raym.
395.

“And though access may be presumed, as from the parties living not far distant, yet may evidence still be admitted to prove, that in fact no access had taken place.”

*For where in an issue out of chancery to try whether the plaintiff was the heir at law of *Thomas Pendrell*, it was agreed that the plaintiff's father and mother had been married, and had cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; and that at the end of three years, the plaintiff was born. The plaintiff rested his case on the presumption of law in favor of legitimacy, and on there being some doubt if the plaintiff's father had not been in *London* during the last year; but this was encountered by strong evidence of want of access. The Chief Justice *Raymond* over-ruled the old doctrine of legitimacy if the father is within the four seas, and left to the jury to decide on the evidence, Whether there had been access or not? and the jury found against the plaintiff.

Pendrell v.
Pendrell.
2 Stra. 925.
*[484]

“And the child of a married woman may be proved to be a bastard by other evidence than the non-access of a husband.”

For where in this case the question turned on the legitimacy of *Joseph Turner Hales*, under whom the defendant derived: to prove that he was illegitimate, the lessor of the plaintiff proved the marriage of his mother, by her maiden-name of *Tilyard* with one *Simon Kilbourn* in 1705; that she lived with him in *Norwich*, for some time, without having any children; that *Kilbourn* left *Norwich*, after which she cohabited with a person of the name of *Hales*: that she and *Hales* lived publicly as man and wife, during which time *J. T. Hales* was born, and that he was always reputed a bastard in the family. Where the husband was during that time did not appear; but an old witness said, that he went to *London*, where it was supposed that he remained, and that he returned to *Norwich* after his wife's death. It was further proved, that *J. T. Hales* always went by that name, except in one instance where he sold an estate, which had been devised to his mother by her father; and in the conveyance he styles himself *Joseph Kilbourn*, otherwise *Hales*. It was proved also that his mother was buried by the name of

Goodright ex
dim. Tompson
v. Saul.
4 T. Rep. 356.

of *Kilbourn*: the counsel for the defendant then insisted, that on these facts given in evidence by the plaintiff, that *J. T. Hales* should be deemed legitimate, as no direct proof was given of non-access by the husband, and that he should not be bastardized by proof that another person had cohabited with his mother: the judge being of that opinion, directed a verdict for the defendant. On a motion for a new trial, the learned judge himself changed his opinion respecting the necessity of the proof of non-access, *et curia consentiente*, a new trial was granted.

St George v.
St. Margaret's,
Westminster.
Salk. 123.

* [485]

So where a woman is separated from her husband by a divorce of *a mensa et thoro*, the children she has during a *separation are bastards; for a due obedience to the sentence shall be intended, unless the contrary is shewn; but if a husband and wife separate and live apart, without sentence of a divorce, the children shall be taken to be legitimate, and so deemed till the contrary be proved; as in the case of *Pendrell v. Pendrell*. So if a special verdict finds no access, the child is a bastard.

Rex v. Inhabit-
ants of Redall,
in Yorkshire.
2 Stra. 1076.

So where a case of removal stated that there had been no access for seven years, though there was evidence that the husband was living, it was held sufficient to bastardize the issue; as if there was no access, it was immaterial whether the husband was living or not.

3. "But where the issue of persons married is to be bastardized by evidence of *no access*, the *wife shall not be admitted to prove that fact*, for that may be proved by the evidence of others; but she is an admissible witness to the *fact of incontinence*, on account of the necessity, from the want of other proof."

Rex v. Reading.
B. R.
Mich. 8 Geo. 2.
Bull. N. P. 112.

And therefore where the wife gave evidence of her having had connection with the defendant, and that he was father of the child, and that her husband had had no access to her for a great length of time, and there was no other evidence of the husband's not having had access to her, but there was evidence that he was within seven miles of her all the time; it was held, That her evidence as to the fact of incontinence was good, as she might be the only witness of it that could be had; but that of the non-access, that there might be others, and that so her evidence was insufficient to that fact.

Rex v. Rook.
1 Wils. 340.

And in this case the same point was expressly decided.

3. Where the Child has been born out of Time.

5 Danv. 726.

"It is not precisely settled what shall be deemed the exact and certain time for a child to be born after the death of the father, in order to be held to be legitimate."

Trin. 18 Ed. 1.
Rot. 13.
Bull. N. P. 114.

Where the feme went *eleven months* after the death of the husband, it was resolved that the issue was not legitimate;
for

for it was born *post ultimum tempus mulieribus pariendo constitutum*.

But in this case, where the husband died the 23d of March, and the child was born the 5th of January following, which was nine solar months and thirteen days; it being proved that the woman had been much abused, and often compelled to lie in the streets; and physicians giving evidence that such treatment might delay the birth, the child was held to be legitimate.

Alfop v.
Bowtrell.
Cro. Jac. 541.

[486]

And note, That the rule *quod non justum est post mortem aliquem bastardum facere*, &c. holds only in the case of *bastard eigne et mulier puisne*. But if H. marries a woman, and she marries again, living H., the last marriage is void, without any divorce, and the jury shall try the fact, which proves it not a marriage.

Pride v. Earls
of Bath and
Montague.
Salk. 120.

And this rule, That the parents shall not be allowed to bastardize their issue, holds only where it is to bastardize issue *born after marriage*; for either parent may be an evidence in their lifetime that a child was born before marriage: and general declarations to that effect, or an answer in chancery, are good evidence to prove a child born before marriage, but not to bastardize a child born after marriage.

Goodright ex
dim. Stevens
v. Mofs.
Cowp. 591.

6. "Where an ejectment is brought for lands, which have been passed by a *fine*, or of which a recovery has been suffered; the production of the fine and recovery is a complete bar, not only to the parties and privies to the fine and their heirs, but to all other persons: but those who are not of sound mind, or full age, in prison, women covert, and not within the four seas, such persons have five years after the proclamations made, after their respective disabilities are removed, to make claim. Stat. 18 Ed. 1. and 4 H. 7. c. 21."

To this there is an exception by stat. 32 H. 8. c. 36. of fines levied by women, of lands of the gift of the husband or his ancestor after the husband's death, assigned to her in tail for jointure, and also of lands entailed by act of parliament, or letters patent, and of which the reversion is in the crown, of which a fine or recovery is no bar to those in reversion.

And where a fine is to be proved with proclamations, (as it must be to bar a stranger,) the proclamations must be examined with the roll, for though the chirographer is authorized by the common law to make out copies to the parties to the fine itself, yet he is not appointed by the statute to copy the proclamations; and therefore his indorsement on the back of the fine is not binding.

Chettle v.
Pound.
Bull. N. P. 230.
Allen's case.
Clayt. 51. S. P.

But

Doc ex dim.
Foster v.
Williams.
Cowp. 621.
Vid. S. C.
post. 489.

But it seems that if a fine is produced for the defendant, the plaintiff may put him on proving, that the person who levied the fine *was in possession* at the time; and if he cannot prove it, the fine is no bar.

[487]

2. "As to the validity and effect of a recovery. A *præcipe* does not lie against a person that is not seised of the freehold; therefore when a recovery is shewn, it is necessary to prove seisin in the tenant to the *præcipe*; however, in an ancient recovery seisin will be presumed, especially where possession has gone along with it, for that induces a presumption that every thing was regularly done."

Warren ex dim.
Webb v.
Grenville.
2 Stra. 1129.

As where on a trial at bar, the plaintiff claimed under an old entail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time the son suffered a recovery, which was in 1699, under which the defendants claimed; the defendants were not able to prove the surrender of this life-estate, and it was therefore insisted that there was no tenant to the *præcipe*, and so that the recovery was no bar: to obviate this difficulty, the defendants offered in proof the book of an attorney, then dead, in which were charges for drawing the surrender of the tenant for life: and they further relied on the presumption from the length of time that all things were regular, and a surrender made. The Court held the book of the attorney good evidence, on which to found a presumption; and seemed to think, even without that, after such a length of time (forty years), that they would presume a surrender.

"But in a modern recovery the Court will expect some evidence whereon to ground a presumption, or proof of an actual surrender."

Goodtitle ex dim.
Bridges v.
D. of Chandos.
2 Burr. 1065.

As where the tenant in tail in remainder suffered a recovery of the lands then held by the widow of his brother; and there was no proof of any surrender by her: the Court held, That they would not presume a surrender, particularly, as immediately on her death the ejectment was brought by the person entitled.

By 14 Geo. 2. c. 20. it is enacted, "That all common recoveries, suffered or to be suffered without any surrender of the lease for life, shall be valid, provided it shall not extend to make any recovery valid, unless the person entitled to the first estate for life, or other greater estate, have, or shall convey, or join in conveying an estate for life at least to the tenant to the *præcipe*. And by the same act, where any person has, or shall purchase for a valuable consideration, any estate, whereof a recovery was necessary to complete the title, such person and all claiming under him, having been in possession from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, prove in evidence the deed

“ making a tenant to the *præcipe*, and declaring the uses;
 “ and the deed so produced (the execution thereof being
 “ duly proved) shall be deemed sufficient evidence that such
 “ recovery was duly suffered, in case no record can be proved
 “ of such recovery, or the same should appear not regularly
 “ entered; provided, that the person making such deed had
 “ a sufficient estate and power to make a tenant to the *præ-*
 “ *cipe*, and to suffer such common recovery: it is further
 “ enacted, That every common recovery suffered or to be
 “ suffered, shall, after the expiration of twenty years, be
 “ deemed valid, if it appear on the face of such recovery that
 “ there was a tenant to the writ; and if the persons joining
 “ in such recovery had a sufficient estate or power to suffer
 “ the same, notwithstanding the deed to make a tenant to
 “ such writ shall be lost: it is further enacted, That every
 “ recovery shall be deemed valid, notwithstanding the fine or
 “ deed, making a tenant to such writ, shall be levied or ex-
 “ ecuted after the time of the judgment given, and the
 “ award of seisin; provided the same appear to be levied or
 “ executed before the end of the term in which such recovery
 “ was suffered, and the persons joining in such recovery had
 “ a sufficient estate and power to suffer the same.”

[488]

6. If the lessor of the plaintiff's title is under an assign- Garrett v.
 ment by an administrator, if he cannot produce the letters Lyfter.
 of administration, the book of the ecclesiastical court, where 1 Lev. 25.
 the order was entered for the granting of them, is good evi-
 dence, or a copy of the book will be sufficient; but such
 will not be sufficient for the administrator himself, unless
 he proves the administration under the seal of the court
 was lost.

So if an ejectment is brought against the devisee of a copy- Anon.
 holder, *by the lord or by a stranger*, the recital of the will in 1 Ld. Raym.
 the admittance is good evidence of the devise: but if the 735;
 ejectment is *by the heir* against the devisee, the will itself
 must be proved.

7. An *old terrier or survey of a manor*, whether ecclesiastical Bull. N. P. 248.
 or temporal, may be given in evidence; for there can be no
 other way of ascertaining old boundaries or tenures.

But a *terrier of glebe* is not evidence for the parson, unless Ibid.
 signed by the churchwardens as well as the parson, nor even
 then if they are of his nomination; and though it be signed
 by them, it deserves little credit, unless it be likewise signed
 by the substantial inhabitants: but it is in all other cases evi-
 dence against the parson.

So where the question in ejectment was, “ *parcel or not,*” Anon.
 a *survey* taken by one of the parties, without the privity or 1 Stra. 95.
 concurrence of the other, was held to be no evidence.

8. The

Bourne v.
Turner.
1 Stra. 633.

8. The *tenant in possession* is not an admissible witness for his landlord; for he is liable to an action for the mesne profits; and so being interested is inadmissible.

[489]

“Neither is he a witness to *prove possession* in his landlord, “for it is to support his own possession.”

Doe ex dim.
Foster v.
Williams.
Cowp. 621.
Doe ex dim.
Winchley
v. Pye.
Espin. Caf. N.P.
364. S.P.

For where a fine was produced to bar the plaintiff's right, levied by a Mrs. Galton, under whom the defendant claimed, it was objected for the plaintiff, that the fine alone was not sufficient, unless accompanied with some evidence to shew that Mrs. Galton was in possession when the fine was levied, or had received rent: to prove possession, the *tenant in possession, upon whom the ejectment had been served, was called*, but was rejected by Lord Mansfield; and on a motion for a new trial, the Court concurred in opinion that the witness was inadmissible.

Goodtitle, lessee
of Fowler, v.
Welford.
Doug. 134.

9. If an *executor takes no beneficial interest* under a will, he is a competent witness to prove the sanity of the testator; and if *he, or any other person who is interested, executes a surrender or a release of his interest*, he may be examined as a witness to establish the will, though the person to whom the surrender or release was offered to be made, refuse to accept of it.

Eusby v.
Greenplate.
1 Stra. 445.

And in this case a person who had sold an estate, but *without a covenant for a good title or a warranty*, was allowed to be a witness to prove the title of the vendee.

Smith v.
Blackham.
Salt. 283.

10. An *heir-apparent* may be a witness to prove the title of land, but a *remainder-man* cannot, for he has a present estate in the land; but the heirship of the heir is a mere contingency. Here the case was, The heir of a bankrupt was brought to prove a debt due to him in an action by the assignee, and an objection was taken to his evidence, that the surplus of the real estate (which is only to come in aid of the personal) being to go to the bankrupt and his heir, that the heir, by swearing as to the personal estate, has the benefit that he discharges the real estate as to so much; but the Chief Justice over-ruled the objection, as too remote a contingency.

Goodtitle ex
dim. Revett v.
Braham.
4 T. Rep. 497.

11. To prove that a name subscribed to a will was forged, a clerk of the *Post-Office*, accustomed to inspect franks for the detection of forgeries, was called to prove that the hand-writing subscribed to a will was an imitated hand, and not a natural one; and also to prove that two hands, suspected to be imitated hands, were written by the same person.

Stanger v.
Searle.
Espin. Caf. N.P.
14.

But where such evidence is offered, the party shall not be allowed to judge from comparison of hands, without knowledge of the person's hand-writing.

12. “Hear-

12. "Hearsay-declarations, as to the person who was seised, or whether lands are parcel or not parcel, are in many cases admissible evidence."

As where the lessor claimed as devisee in remainder, under a will made twenty-seven years before, under which there had been no possession, and therefore seisin in the devisor was necessary to be proved; a witness was called, who swore to declaration of the tenant at that time in possession, that *he held as tenant to the devisor*: it was objected that this was mere hearsay-evidence, made by a person not upon oath: but the Court held it to be good evidence.

Holloway v. Rakes.
Mich. 12 G. 3.
Quot. 2 Term Rep. 55.

So where the question was, Whether a certain tenement was parcel of the lands of *Bulchystullen* in *Cardiganshire*, or *Lynst* in the same county, declarations by the tenant who had rented both farms, but was then dead, that he rented the two parcels of land of different landlords, and that the *locus in quo* was parcel of one of them, shall be admissible evidence to ascertain of which of them the *locus in quo* is part.

Davies v. Peirce.
2 Term Rep. 50.

5. OF THE VERDICT, JUDGMENT, AND WRIT OF ERROR, WRIT OF POSSESSION, AND OTHER PROCEEDINGS.

I. OF THE VERDICT.

1. "In ejectment the plaintiff shall always recover according to the title which he makes out, though not consistent with that stated in the declaration."

As in the case of *Bedford ex dem. Carruthers v. Dendien*, Ante 447-ante 447, where the plaintiff having a title to but five years, yet declared for seven, recovered notwithstanding, according to his title.

So the plaintiff may declare for any number of acres, and recover so many only as he proves a title to.

2. If the declaration in ejectment goes for several things, "and there is a general verdict, though the declaration is bad as to part, yet the plaintiff may recover for the remainder."

As where the declaration was for a messuage or tenement, and four acres of land belonging to the same, and there was a general verdict; on a motion in arrest of judgment it was decided, That though the declaration as to the first part for a messuage or tenement was bad for uncertainty, yet it was held to be good as to the four acres, which could not be said to belong to any house. But the damages and costs being entire, it was held, that the plaintiff could not have judgment as to them.

Wood v. Payne.
Cro. Eliz. 186.

* 3. In a recovery in ejectment of one hundred acres of land, twenty of pasture, &c. without mention of any house or

Anon.
Dyer, 47. a.
*[491]

or garden, it was nevertheless held that the plaintiff should recover all the erections thereon.

2. OF THE JUDGMENT AND WRIT OF ERROR.

Hooper v. Dale.

1 Stra. 531.

Dobbs v. Passer.

2 Stra. 975.

1. The casual ejector can in no case confess a judgment.

2. Though the plaintiff has had a judgment regularly obtained, if he has not lost a trial, the court will set it aside upon payment of costs and taking notice of trial; for though the defendant may afterwards bring his ejectment, yet change of possession in consequence of the plaintiff's judgment, may be of great loss and inconvenience to the defendant; as felling of timber, &c.

3. By stat. 16 Car. 2. c. 8. s. 17. "If the defendant in ejectment brings a writ of error, he shall be bound to the plaintiff in such reasonable sum as the Court shall think fit."

4 Burr. 2502.

This sum is generally double the rent.

"Under this statute the defendant is entitled by law to his writ of error, if he offers to become bound as the statute directs."

Evan Thomas
v. Goodtitle.

4 Burr. 2501.

Therefore where in this case the lessor of the plaintiff swore that the defendant was insolvent, and also that he had a mortgage against the land to more than it was worth, yet the Court held the defendant entitled to his writ of error, he becoming bound in double the rent.

And by the same statute, "In case judgment be affirmed upon a writ of error, the Court may award a writ of inquiry as well of the mesne profits as of the damages by reason of any waste committed after the first judgment."

Wharrod v.
Smart.

3 Burr. 1823.

Though in this case where the defendant brought a writ of error in parliament upon a judgment in ejectment, the Court obliged him to enter into a rule not to commit waste or destruction during the pendency of the writ: and he justified in 400l.

2 Burr. 757.

4. A writ of error cannot be sued out in the name of the casual ejector.

George ex dem.

Bradley v.

Wilson.

2 Burr. 756.

And if judgment has been signed against the casual ejector by default, when plaintiff moves for leave to take out execution against the casual ejector, is the time when the landlord, if he brings a writ of error, is to shew that as a cause why the plaintiff should not have leave to take out execution; and if he then omits it, and leave is given, the execution will not be set aside.

[492]

4. "Nothing shall be assigned for error which will make it necessary to go again into the title of the lands."

For where, after a judgment for the plaintiff, error was assigned, that the lessor of the plaintiff was seised in right of his wife, and that she was dead before judgment, and that so the lease was determined; it was adjudged, That as the error depended upon the death of one, not party to the suit, that it could not be allowed; for the plaintiff might say that the lessor was seised in his own right, or the like, and so the title would be to be re examined on a writ of error.

Wilkes v.
Jordan.
Hob. 5.

3. OF THE WRIT OF POSSESSION.

1st. If the lessor of the plaintiff has judgment in ejectment, it is to recover the term, upon which an *habere facias possessionem* issues to the sheriff, to put the plaintiff into possession.

2. But if a year and day pass after judgment, the plaintiff cannot have an *habere facias possessionem* without a *scire facias* first issuing.

Withers v.
Harris.
Salk. 258.

3. Where the lessor of the plaintiff died in the vacation, and the writ of possession was taken out after his death, but was tested of the last day of the preceding term, and so over reached the time of his death, the writ was held to be regular.

Doe ex dim.
Beyer v. Roe.
4 Burr. 1970.

4. OF THE COSTS.

1. If the lessor of the plaintiff is an *infant*, the Court will on motion stay proceedings till he gets somebody to enter into a rule to pay defendant his costs, if defendant has a verdict; an infant not being liable to costs.

Anon.
1 Will. 130.
Noke v.
Wyndham.
1 Stra. 604.

2. Where the lessor of the plaintiff *lived in Ireland*, the Court stayed the proceedings till he had given security for payment of costs, though the ejectment was brought under the direction of the Court of Chancery, and security had been already given there for 40*l*.

Doe ex dim.
Lucas v. Fulford.
2 Burr. 1177.

3. "Though the lessor of the plaintiff's title is at an end, yet the Court will not stay proceedings."

As where his title was as *tenant for life*, and it appearing that he was dead, defendants applied to stay the proceedings; but the Court refused the motion, as the plaintiff had a right to proceed for damages and costs; but they obliged him to find security for costs.

Thrustcut ex dim.
Turner v. Gray.
2 Stra. 1056.

* 4. If there is an ejectment against several, and the plaintiff is nonsuited, he may pay the costs of the nonsuit to which of the defendants he pleases.

Jordan v.
Harper.
1 Stra. 516.

* [493]

5. By stat. 8 & 9 W. 3. c. 11. "In ejectment against several, if any one or more is acquitted by verdict, he shall recover his costs against the plaintiff, unless the judge

EJECTMENT.

" shall certify in open court that there was good cause for
 " making such person a defendant."

5. OF BRINGING A SECOND EJECTMENT.

Anon. Salk. 255.
 Grumble v.
 Badily.
 1 Stra. 554.
 Doe v. Alton.
 1 Term Rep. 491.
 S. P.
 Roe ex dim.
 Chambers v.
 Law. 2 Black.
 Rep. 1180.
 Smith ex dim.
 Ginger v. Barnardiston.
 2 Black. Rep.
 904.

1. The plaintiff may bring a second ejectment for the same lands; but unless it appears to the Court that there is good ground for bringing such second ejectment, the Court will stay proceedings *until the costs of the first are paid*.

As where it is done merely for vexation, or there is any thing fraudulent in the proceedings.

And though the lessor of the plaintiff had neglected in the former ejectments to enter into the consent-rule, yet proceedings were staid until payment of costs.

" But where the plaintiff does shew some good and
 " satisfactory grounds to the Court, he may be allowed to
 " bring the second ejectment without paying the costs of
 " the first."

Short v. King.
 1 Stra. 681.

As where the plaintiff declared on one demise, but afterwards finding it necessary to join trustees, he delivered a new ejectment, the Court allowed it without payment of costs.

" But a *mistake* alone seems not to be sufficient to exempt
 " the plaintiff from payment of costs."

Ld. Coningsby's
 case.
 1 Stra. 548.

For where Lord *Coningsby* brought an ejectment, and had a rule for a trial at bar, and finding it to be on a wrong demise, delivered new ejectments; and coming again for a trial at bar, the Court refused to grant it, but on payment of the costs of the former ejectment.

Keene ex dim.
 Angell v. Angell.
 6 T. Rep. 740.

" And though there may be some difference as to the
 " parties in the ejectments, yet *if the question and title is the*
 " *same*, the costs of the former ejectment shall be paid be-
 " fore the second is suffered to proceed."

Doe ex dim.
 Ducheſs of
 Hamilton v.
 Hatherly.
 1 Stra. 1152.

As where an ejectment had been brought under the demise of the husband and wife, and the plaintiff had been nonsuited; and after the husband's death the wife brought a new ejectment, the Court stayed proceedings in it till the costs of the first ejectment were paid.

Fenwick v.
 Grosvenor.
 Salk. 258.

* [494]

* 2. After a verdict in ejectment and judgment for the plaintiff, if the defendant brings a writ of error, he shall not be allowed to bring an ejectment until he has quitted possession, or the tenants have attorned to the plaintiff, so that the plaintiff is in possession, and he out; for if the plaintiff in the first ejectment was to get judgment in this last ejectment, there would be two judgments for the same thing; but if the defendant goes on a different title, proceedings will not be stayed in the second ejectment.

6. OF TRESPASS FOR THE MESNE PROFITS.

1. "The verdict in ejectment having established the right of the plaintiff; from the time that his title accrued, the defendant is a trespasser, and the plaintiff entitled to recover from him the damages for his unjust possession, equal to the value of the lands during that time. This is done by an action of *trespass*, the damages in ejectment being usually but one shilling."

3 Black. Com. 205.

But it seems to be a point not clearly settled, how much the plaintiff is entitled to recover for the mesne profits.

In this case it was held, That the plaintiff is not bound to claim the mesne profits, *only from the time of the demise*; for if he proves his title to have accrued *before that time*, and proves the defendant to have been longer in possession, he shall recover antecedent profits.

De Costa v. Atkyns.
Per Eyre, Ch. J.
Hil. 4 G. 2.
Buller N. P. 37.

But in such case, if the plaintiff goes for time *before the demise* laid in the declaration in ejectment, the defendant is at liberty to *controvert his title*; but if he goes only for the time from the demise laid, the record of the recovery in ejectment is conclusive evidence of the plaintiff's title from that time, and cannot be controverted; and in such case it is sufficient for the plaintiff to produce the judgment in ejectment, and the writ of possession executed: so against a precedent occupier the record is no evidence, and therefore against him the plaintiff must shew and prove a title.

Ibid. and
2 Burr. 667.

Collingwood & Ramsay v. several Defendants.
1 Sid. 239.

"So with regard to possession, another doubt arises."

In this case it was held, That the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore if a man makes his will and dies, the devisee will not be entitled to the profits till he has made an actual entry.

Stanynought v. Cofins.
2 Barnes, 367.

On the other hand, it is laid down, That when the plaintiff has once made an actual entry, that that will have relation to the time of his title accrued, so that he may recover the mesne profits from that time.

2 Roll. Abr.
title Trespass
per Relation.
[495]

But however, if a subsequent entry has a relation back to the time of the plaintiff's title accrued, yet the defendant may plead the statute of limitations, and so protect himself from all but the last six years.

Buller N. P. 88.

2. This action of trespass for the mesne profits may be brought either by the *nominal plaintiff in ejectment*, or by the *lessor of the plaintiff himself*, even in the case of a judgment by default against the casual ejector; but if the action is brought by the nominal plaintiff in ejectment, the Court

Astyn v. Pa kyn.
2 Burr. 665.

Buller, N. P. 9.

EJECTMENT.

will, upon application, stay proceedings till security is given for answering the costs.

Goodtitle v.
Toombs.
3 Will. 118.

3. If one *tenant in common* recovers in ejectment against the other, he may maintain an action of trespass for the mesne profits; though the contrary doctrine is expressly laid down in *Litt. f. 323. Co. Litt. 199.*

Thorp v. Fry.
Oa. Str. 5.
Buller N. P. 87.

4. Where the judgment is against the *tenant in possession*, and the action of trespass is brought against *him*, it seems sufficient to produce the judgment, *without proving the writ of execution executed*; because by entering into the rule to confess, the defendant is estopped, both as to lessor and lessee, so that either may maintain trespass without proving an actual entry: but where the judgment was against the *casual ejector*, and so no rule entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed.

Jefferies v.
Dyson.
2 Stra. 960.

In trespass for the mesne profits, if the judgment has been against the casual ejector, and no writ of possession executed, the defendant in possession may controvert the title, if he has not been made a defendant in the ejectment, and had a verdict against him, and therefore the recovery in ejectment is not against him conclusive evidence.

Holdfast v.
Morris.
2 Will. 115.

5. In trespass for the mesne profits against the tenant in possession after a recovery in ejectment by default against the casual ejector, the tenant cannot *pay the money into court*, for the action is for a tortious occupation from the time the tenant had notice of the title of the lessor of the plaintiff.

Buller N. P. 88.

6. Where this action is brought after a judgment by default against the casual ejector, it is usual for the plaintiff to recover the costs of the ejectment as well as the mesne profits.

Doe v. Davis.
Espin. N. P. Caf.
358.

As to which there is this distinction. That if the ejectment was regularly defended, the plaintiff can go for no costs of *it*, for they must be supposed to have been paid as part of the costs of *that* action; *aliter* if there was a judgment against the casual ejector by default.

CHAPTER X.

The Action of Slander.

SLANDER is the defaming a man in his reputation, by speaking or writing words from whence any injury in character or property arises, or may arise, to him of whom the words are used.

Slander may be committed, 1st, By words: 2dly, By writing, which is called, by *libel in scriptis*: 3dly, By pictures, or representations of that sort, which is called *libel sine scriptis*. Case de Libellis
Famosis.
5 Co. 125.

In treating of this action I shall first consider each species of slander now laid down in its order, and the rules of construction adopted by the courts: 2d, The pleadings: 3d, The verdict, judgment, and costs.

I. OF SLANDER BY WORDS.

Words for which this action may be maintained are, either such as are in themselves actionable, or such as become so by reason of some special damage arising from them.

1st. OF WORDS IN THEMSELVES ACTIONABLE.

These are, 1st, Which bring a man into any danger of legal punishment; as to say, "That he poisoned another:" 2dly, Which may operate to exclude a man from society; as to say, "That he hath an infectious disease:" 3dly, Which injure a man in his trade or profession; as to call a *trader* a *bankrupt*: 4thly, Which charge a man in a public capacity or office with principles inconsistent with his office; as to say of a *justice of peace*, "That he was a Jacobite, and for bringing in the pretender."

I. OF WORDS ACTIONABLE, FROM THEIR BRINGING THE PERSON OF WHOM THEY ARE SPOKEN TO THE DANGER OF LEGAL PUNISHMENT.

1. "These words must charge a *fact to have been committed*; for to charge a man with *bad or evil intentions*, is not sufficient."

* As where the defendant said of the plaintiff, "He is a brawler and quarreller, and gave his champion counsel to kill Eaton v
4 Co.
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EJECTMENT.

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* As where the defendant said of the plaintiff, "He is a brawler and quarreller, and gave his champion counsel to kill Eaton v. Allen.
4 Co. 16. b.
* [497]

SLANDER.

kill me, and then fly the country;" these words were adjudged not to be actionable, for they charge no fact committed, and the purposes or intentions of a man without action are not punishable by law.

Bland's case.
Hutt. 18.

So where the words were "He is a troublesome fellow, and I doubt not to see him indicted at the next assizes for sheep-stealing;" these words were adjudged not be actionable, as not charging the party with any fact committed.

"For the words should import some degree of *guilt*."

Steward v.
Bishop.
Hutt. 2.

As to say a man is *in gaol* for stealing a horse, is not actionable; for the person might be innocent, and the words only import his being in on suspicion.

Beaver v. Hides.
2 Will. 300.

But in this case, when the words were of the same import, "he was put into the round-house for stealing ducks at *Crowland*:" the plaintiff had a verdict, and on a motion in arrest of judgment, the Court held, That he should recover, the jury having found them to be *false* and *malicious*.

"On this ground *adjective words* are actionable or not, according as they *presume an act committed or not*."

Brittridge's case.
4 Co. 18. b.

As where the words laid were, "he is a *perjured old knave*:" that distinction was taken; so that if one calls another *sedition* or *thievish* knave, these words are not actionable, for they only import an inclination to sedition or theft not that the party ever was guilty of either; but the word *perjured* imports an act committed, and so is actionable.

"So they may be actionable according to the application of them or allusion to the circumstances under which they were spoken."

Holt v. Scholefield.
6 T. Rep. 691.

As where the words were of a person "That he was *for-sworn*."—These words would be actionable if applied to a swearing in a judicial proceeding, but otherwise if spoken without any allusion to it:—and on that ground where the words were laid *generally* without any colloquium respecting legal proceedings, the Court held, That they were not actionable, and there being a general verdict, arrested the judgment.

Finch's Law.
186.

2. "It is not necessary to make words actionable under this head, that they *endanger the person's life*, or charge him with felony, for to charge him with any lesser crime, for which he is *liable to prosecution*, is actionable: as to say he hath gone about to get poison to kill the child that such a woman goeth with (which is no felony) yet these words are actionable."

So

So where the words were, "You are a thief—Of what? Of every thing:" these were held to be actionable, though the theft might be of what was no felony; as apples from a tree; for that the Court would intend it to be of every thing of which he could be a thief.

Morgan v. Williams.
1 Strep. 142.

And *note*, That where a person had been a thief, but a general pardon of all felonies had passed, of which he had taken the benefit, and a person afterwards called him "Thief;" the words were held to be actionable, he being cleared of all guilt by the pardon.

Cuddington v. Wilkins.
Hob. 81.
[498]

3. "Words should be taken with reference to the subject matter in allusion to which they were spoken—as in such case words actionable *prima facie* in themselves may by reference to that of which they were spoken not be actionable."

As where the words were, "He is a thief, for he has stole my beer." The defendant was a brewer, and the plaintiff lived with him as his servant, and the words were spoken alluding to several sums of money received by the plaintiff in that capacity from the defendant's customers for which he had not accounted. Lord *Kenyon* desired the jury to consider whether the words alluded to the mere breach of trust, or to an actual stealing of the beer; as in the first case they were not actionable, but otherwise in the latter. The jury found for the defendant.

Christie v. Cowell.
Peake N.P. Cas.
4.

4. "Though the words may import a charge of felony, yet if it appears that *the fact charged could not have happened*, this action will not lie."

As where the plaintiff declared that the defendant, *having a wife then living*, said of the plaintiff, "He has killed my wife; he is a traitor:" on demurrer the words were adjudged not to be actionable, for that the wife being living, the plaintiff could never be brought into danger; and so the words were vain, and no scandal.

Snag v. Geo.
4 Co. 16. a.

The second class of actionable words are,

2. WORDS WHICH OPERATE TO EXCLUDE A MAN FROM SOCIETY.

As to say of a man that "He is a leper, or hath got the leprosy," is actionable; for "a leper" shall be removed from the society of men by a writ *de leproso amovendo*.
1 Roll. Abr. 44.

Taylor v. Packins.
Hil. 4 Jac. B. R.
Cruttal v. Horner.
Hob. 219.
James v. Rutlech.
4 Co. 17. a.

So where the words were, "He is full of the pox; I marvel that you will eat with him:" these words were adjudged to be actionable.

But the words must charge the person with having such disorder *at the time of speaking the words*; for if not, the words

Carlake v. Mapledoram.
2 T. Rep. 473.

words do not operate to exclude the person from society: as "she *hath* given the bad disorder to feveral," is not actionable, as not spoken in the present tense.

Taylor v. Hall.
2 Stra. 1189.

So where the words were "That he *had had* the pox;" they were held not to be actionable; for it is avoiding him for fear of contagion, and refusing to keep him company, that is the legal notion of damage; and when he is cured, these inconveniences will not attend him; and for that judgment was arrested.

The third class of words in themselves actionable are,

3. WORDS WHICH INJURE A MAN IN HIS TRADE OR PROFESSION.

Day v. Buller.
3 Will. 59.

1. As where the words were spoken of an attorney, "What, does he pretend to be a lawyer? He is no more a lawyer than a devil:" these words, as scandalizing him in his profession, were adjudged to be actionable.

4 Co. 19. a.
[499]

So if one says of a merchant, "He is a bankruptly knave," or "That he will be a bankrupt within two days," or such like insinuations; these words are actionable.

"And words tantamount, as conveying implied slander, "shall be deemed actionable."

Stanton v.
Smith.
2 Stra. 762.

As where the words were, "You are a forry fellow and a rogue, and compounded your debts for five shillings in the pound:" these were held to be actionable when spoken of a trader, being tantamount to calling him *bankrupt*.

2. "When words are used to any person which are applicable to his profession or calling, and tend to scandalize it, they shall be taken as applying to it, and be "actionable."

Byrchley's case.
4 Co. 16.

As where *Byrchley*, the plaintiff, being one of the attornies or clerks in court of *B. R.* and sworn to deal duly without corruption in his office, the defendant speaking of the plaintiff's manner of dealing in his profession, said to *Byrchley*, "You are well known to be a corrupt man, and deal corruptly:" these words were adjudged to be actionable, as slandering him in his profession, to which the words referred; for *sermo relatus ad personam, intelligi debet conditione personæ*.

The last species of words in themselves actionable are,

4. WORDS SPOKEN IN DEROGATION OF A PERSON IN ANY OFFICE OF DIGNITY, TRUST, OR PROFIT;

As public officers, magistrates, &c. Under which head may be considered *scandalum magnatum*, or slander of peers, or other eminent persons.

1. "With

1. "With regard to this head it is to be observed, that words may be actionable with regard to these, which would not be held so in the case of a common person"

As where the words were used of the Marquis of *Dorchester*, "My lord is no more to be valued than the dog that lies there:" these words were held to be actionable. *Proby v. Marq. of Dorchester.* 1 Sid. 231.

"So in the case of a common person, words importing merely *bad inclinations*, are not actionable (*ante* 496); but it is otherwise in the case of *public persons or magistrates*."

For where the plaintiff declared, that being a *justice of peace* and *deputy-lieutenant*, and having served as knight of the shire for the county of *Gloucester*, and intending to stand candidate for it again, the defendant said of him, "He is a Jacobite, and for bringing in the pretender and popery to destroy our nation:" these words, which only charged inclinations and principles, were held to be actionable. *How v. Inn.* Salk. 694. [50]

So where the words were spoken of the plaintiff, who was a *justice of peace*, "He is a rascal, a villain, and a liar;" they were held to be actionable when applied to a person in an office of trust or dignity. *Aston v. Blagrove.* 1 Stra. 61. 2 Lord Ram. 1369. S. C.

So where the words were spoken of *Stuckley*, who was a justice of peace for *Devonshire*, "*Stuckley* covereth and hideth felonies, and is not worthy to be a justice of peace;" the plaintiff recovered, for it was against his oath and office, and a good cause to put him out of the commission, and indict and fine him. *Stuckley v. Bulhead.* 4 Co. 16.

2. "But where the words do not charge the person in such trust or office, with any breach of his duty or oath, with any crime or misdemeanor, whereby he has suffered any temporal loss in fortune, office, or any way whatsoever, but are spoken as *matter of opinion* as to such person's conduct, such words are not actionable."

As where the plaintiff being knight of the shire for the county of *Surry*, the defendant, at a meeting of the freeholders of the county, used the following words: "As to instructing Mr. *Onslow*, you might as well instruct the winds; and should he promise his assistance, I should not expect that he would give it:" these words were adjudged not to be actionable, as charging no crime, but being merely matter of opinion; and *per Lord Chief Justice De Grey*, to impute to any man the mere defect of moral virtue, moral duty, or obligation, which renders a man obnoxious, is not actionable, such as the present case, which is merely insinuating a doubt of Mr. *Onslow's* honour. *Onslow v. Horn.* 3 Will. 177.

3. But a distinction is to be observed when the words are used to a person in an office of profit, and when in one of credit only: in offices of profit, words that impute either want of

of *understanding*, of *ability*, or *integrity*, are actionable; but in those of *credit*, words that impute want of *ability only* are not actionable: as to say of a justice of peace, "He is an ass; he is a beetle-headed justice," is not actionable; and the reason is that a man cannot help his want of ability; as he may his want of honesty: but even in offices of *credit*, words that import corruption or dishonesty are actionable.

4. As to action of *scandalum magnatum*, it is enacted by stat. *West.* "That if any one slander a peer, or other great person, he shall be punished by imprisonment:" and by stat. 2 *Rich.* 2. "The person injured may in a *qui tam* action recover damages for the offence."

[101]

2. OF WORDS NOT IN THEMSELVES ACTIONABLE, BUT WHICH BECOME SO BY REASON OF SOME SPECIAL DAMAGE; AS LOSS OF PREFERMENT, MARRIAGE, &c.

1. For the Loss of Preferment.

4 *Cor.* 2.

As if a divine is to be presented to a benefice, and one to defeat him of it, says to the patron, "That he is an heretic, or a bastard, or that he is excommunicated;" by which the patron refuses to present him, and he loses his preferment, he may have his action for that slander.

Banster v.
Banster. cited
4 *C.* 17.

So where the defendant said of the plaintiff (who was son and heir of his father), "That he was a bastard;" an action was adjudged to lie, for it tended to disinherit him of the lands which would descend to him from his father: but it was further resolved, That if the defendant pretended that the plaintiff was a bastard, *and he himself the next heir*, no action lies, for it is a claim of right.

"And in such case it seems not necessary that the damage arising from the words be *certain* and *immediate*, for "if it be *probable* and *remote*, it will maintain the action."

Vaughan v.
Ellis.
Cro. Jac. 213.

As where the action was for calling the plaintiff a bastard; and it was moved in arrest of judgment, that he should shew some special damage from a present title and possession, whereas he had only declared that his grandfather was tenant in tail, and his father had divers sons living, of whom he was the youngest; but *there being a possibility that he might inherit, and he proving that he had been offered a sum of money for his possibility*, the action was adjudged to lie.

2. For the Loss of Business or Trade.

Levet's case.
Cro. Eliz. 289.

As where the plaintiff declared that he was an innkeeper, and the defendant said to him, "Thy house is infected with
the

the pox, and thy wife was laid of the pox:" these words were adjudged to be actionable; for it was a discredit to the plaintiff, and guests would not resort thither.

"But in such case it must appear that the words from whence the injury may arise, were used in a conversation concerning the plaintiff's trade or business."

For where the plaintiff declared that he was a trader, and that the defendant said to him, "You are a cheat, and have been a cheat for divers years," judgment was arrested, after a verdict for the plaintiff, it not appearing that there was a colloquium of the plaintiff's trade at the time. [502]

"Though where the words must clearly refer to the plaintiff's trade or calling, they shall be actionable, though no colloquium is found."

As where the plaintiff was a maltster and dealer in corn, and the defendant said of him, "Don't deal with him, he's a cheat, and has cheated all the farmers at Epping, and dares not shew his face there, and now is come to cheat at Hatfield:" these words evidently referring to the plaintiff's trade, were held to be actionable though the special verdict which found them, found also no colloquium of the plaintiff's trade.

3. For Loss of Marriage.

As where the plaintiff declared, that she being a virgin of good fame, was going to be married to one Antony Elcock, and that the defendant said of her, "I know Davis's daughter, she dwelt in Cheapside, and there was a grocer that did get her with child:" by reason of which words the said Elcock refused to marry her; the plaintiff recovered, on account of the special damage.

But in this case a distinction is taken, that in order to make such words actionable, they must be spoken to the person who was in communication to have married the person who was defamed, for if spoken generally the action will not lie; for to call a woman whore, or words tantamount, is a matter of spiritual cognizance, and not actionable at common law, unless under the circumstances above. Sed Q.?

4. For the Loss of Service.

As if a person to prevent a servant from getting a place gives him a false character, it is actionable.

But in such case it must appear to have been given maliciously, and with an ill intention; for though the character given is false, yet if no malice appears, the action will not lie.

3. "But

3. "But it is to be observed, that words in themselves actionable may nevertheless not bear an action, from the particular circumstances under which they are spoken or used."

1. *As if words are spoken out of a motive of friendship, and without intention to defame.*

Herver v.
Dowson.
Sittings after
Trin. 5 G. 3.
Bull. N. P. 8.

* [503.]

* As where the action was for saying of the plaintiff, who was a tradesman, "He cannot stand it long, he will be a bankrupt soon," and special damage was laid in the declaration, viz. "That one Lane refused to trust the plaintiff for an horse:" Lane, the person named in the declaration, was the only witness called for the plaintiff; and it appearing from his evidence, that the words were *not spoken maliciously*, but in confidence and *out of friendship to Lane*, and *only by way of friendship warning not to trust the plaintiff for the horse*; Pratt Chief Just. directed the jury, That though the words were actionable, yet that if they should be of opinion that they were not spoken out of malice, but in the manner before-mentioned, that they ought to find the defendant not guilty; and they did so accordingly.

2. "If they are spoken privately, and in confidence."

Edmonson v.
Stephenson
& ux.
Sittings after
East. 6 G. 3.
Buller N. P. 8.

As where a servant brought an action against her former mistress, for saying to a person who came to inquire her character, "That she was saucy and impertinent, and often lay out of her own bed, but that she was a clean girl, and did her work well:" though the plaintiff proved that she was by this means prevented from getting a place, yet *per Lord Mansfield*, this is not to be considered as an action in the common way for defamation by words, but *the gist of it must be malice*, which is not implied from the occasion of speaking, but should be directly proved: *this was a confidential declaration*, and ought not to have been disclosed.

3. "If the words have been used in the course of legal proceedings, no action will lie for them."

Cutler v. Dixon.
Co. Rep. 146.

As was adjudged in this case, that if *one exhibits articles of peace against any person containing divers great abuses, and misdemeanors, in order to have him bound to his good behaviour*, the party accused shall not have for any matter contained in such articles any action on the case, for the person has pursued the due course of justice; and if those actions were permitted, those who have just cause of complaint would not dare to complain, for fear of vexation.

"But though the defendant may in such case be justified, yet if he does *not confine himself to legal form*, but *charges crimes not properly cognizable by that jurisdiction to which he applies*, an action will lie for those charges."

As

As where *Wood*, the defendant in this action, had exhibited articles in the *Star-Chamber* against Sir *R. Buckley*, and in them, charged several matters not cognizable in that court, and had often declared in the country that the articles exhibited were true, it was resolved, 1st, That for any matter contained the bill which was examinable in that court, no action lay though it was false, because it was in the course of justice: but, 2dly, That for the matters not cognizable in that court, the action lay, as being a slander on a person which he could not defend: 3d, That though for preferring false matter to a competent jurisdiction, no action lies, yet that if he talks at large in the country, and avers his charges to be true, an action lies.

Buckley v. Wood.
4 Co. 14. b.
Cro. Eliz. 230.
S. C.

[504]

It was further held in this case, That if a witness goes S. C. beyond the point in issue, and slanders a third person, this action lies against him.

Note, That if two persons say the same words, yet a joint Buller N. P. 5. action of slander will not lie against them.

2. OF SLANDER BY WRITING, OR LIBEL.

Under this head I shall consider, 1st, The nature of libels: 2. What constitutes the offence, and who are liable to punishment for them.

1. OF THE NATURE OF LIBELS.

Slander by libel differs only from slander by words, that it is delivered in writing or printing; but the offence of a libel is more heinous, as its circulation of the slander is more extensive, and derives too an additional degree of malignity from its being done premeditatedly.

The rules, therefore, before laid down in respect to slander by words, will be found to apply equally in the case of libels: which I shall first consider: and secondly, The more particular nature of libels themselves.

As, 1st, "To charge a person with any crime which may subject him to the danger of legal punishment, is a libel, and actionable."

As to charge a person with sodomitical practices.

Buller N. P. 9.

2. "To alledge any matter which may be the means of excluding him from society."

As where the plaintiff brought his action against the defendant for a libel, charging him, in a ludicrous copy of verses, with having the itch, and stinking of brimstone; the plaintiff recovered in this action, the words charging him with diseases which rendered him unfit for society.

Villers v. Monsby.
2 Will. 403.

3. "So

3. "So where the writing is such as *will injure a man in his trade or profession*, it is a libel for which this action lies."

Harman v.
Delany.
2 Stra. 898.
Fitzgib. 121.
S. C.

* [505]

* As where the plaintiff declared, That he was gun-maker to the Prince of *Wales*, and it having been inserted in the newspapers that he had presented a gun to the Prince of *Wales* two feet six inches long, which would carry as far as one a foot longer; the defendant intending to injure him in his trade, had published another paragraph in the newspapers, mentioning this circumstance, and adding, "That he advised all gentlemen to be cautious of dealing with him, as he would not engage with any artist in town, nor did ever make such experiment (except out of a leather gun) as any gentleman might be satisfied at the *Cross-guns*, *Long-acre*:" this advertisement tending to injure the plaintiff's reputation as an artist, was adjudged to be actionable, though it was agreed, that for one tradesman to pretend to more skill than another, would not be so.

Rex v. Benfield
and Saunders.
2 Burr. 980.

4. "So where the writing injures the domestic peace and happiness of a family, charging a man's children with immorality or incontinence." As here writing a song and singing it about the town, that the prosecutor's daughter was of loose manners, and had gone up to *London* to be delivered of a bastard: this action was held to lie.

5. "But nothing shall be construed a libel which is necessary in the course of legal proceedings, and is relevant to the matter which is before the court."

Lake v. King.
1 Saund. 131.

As where the plaintiff declared, "That he being a doctor of laws, and vicar general to the Bishop of *Lincoln*, the defendant had presented, and caused to be printed a petition to parliament, charging him with divers crimes; as extortion, oppression, and corruption in his office:" the action was held not to lie, the petition being the necessary and usual mode of complaint to parliament for any redress of grievance.

Astley, Bart. v.
Younge.
2 Burr. 817.

So where the action was brought for a libel, and the offence as laid was, "That the defendant in a certain affidavit before the court, had said that the plaintiff in a former affidavit against the defendant had *sworn falsely*:" the Court held that the action would not lie; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceeding, that no action would lie for it.

6. "So no matter which is stated in any memorial or petition for the redress of grievances, and addressed in the proper channel, by which such redress may be had; that is, to the persons only

"only who have power to give such redress, shall be deemed libellous."

As where the defendant being deputy governor of *Greenwich Hospital*, wrote a large volume, of which he also printed several copies, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital, and Lord *Sandwich* in particular, who was then First Lord of the *Admiralty*, with much asperity: he distributed the copies to the governors of the hospital only, but it did not appear that he had given a copy to any other person: on a rule for information for this as a libel, Lord *Mansfield* held, That this distribution of the copies to the persons only, who were from their situation called on to redress the grievances, and had from their situation power to do it, was not a publication sufficient to make that a libel; and he seemed to think that, whether the paper was printed or in manuscript, under these circumstances, made no difference.

Rex v. Ballie.
Mich. 20 C. 3.
B. R. MSS.

"As words spoken without an intention to be made public, as in confidence or privately, are not actionable."

So if a person in a private letter expostulates with another on his vices, it is no libel which is actionable.

Peacock v.
Reynell
2 Brown. 151.

And note, That a libel against a magistrate is a higher offence than against a private person; for it is a scandal upon government.

Cafe de libellis
Famosis
5 Co. 12.

Therefore, if one finds a libel against a private person, he ought to destroy it, or to bring it to a magistrate; but if it is against a public person, he ought to bring it to a magistrate, that the offender may be found out.

Halliwod's
case citd.
5 Co. 15. b.

2. As to the more particular Nature of Libels.

1. A defamatory writing, expressing only the initials, or one or two letters of a person's name, but in such a manner as obviously, and indubitably referring to the person, and so that it would be nonsense if strained to any other meaning, is as properly a libel as if the whole name had been mentioned at large, for it would bring the utmost contempt on the law to suffer its justice to be eluded by such trifling evasions, and that a writing understood by the meanest capacity could not be so by the judge and jury.

Hurt's case.
Trin. 2 Ann.
1 Hawk. P. C.
194.
2 Ark. 470.
S. P.

"A writing, though with feigned names, has been construed a libel."

As was the case of Mrs. *Dodd*, who printed a letter abusing the late king, under the title of *Merriweis, Sophi of Persia*: though the whole letter was so couched in feigned names, yet the jury found the publisher guilty.

Per Lord
Hardwicke.
2 Atk. 470.
[507]

3. "A

3. "A writing, though not directly charging crimes, may be a libel, as if done in a taunting or ironical manner."

Hic's case.
Hob. 215.
Popl. 139. S.C.

As, after recounting any acts of public charity by the person, to say, "You will not play the *Jew* or hypocrite," and so go on in a strain of ridicule, to insinuate that what he did proceeded from vain-glory.

Cafede Libellis
Famdis.
5 Co. 125. b.
4 Rd.

4. It is not material whether the libel be *true* or *false*, or whether the party against whom it is levelled is of *good* or *evil* fame; for the party grieved ought to complain for every injury done to him to the ordinary course of law, and not to have recourse to methods of redress by slanderous publications.

Cafede Libellis
Famdis.
5 Co. 125.
3 Rd.

5. A writing may be a libel, though the person libelled is *dead*; for it stirs up some of the person's family to revenge this attack on his memory; and if he was a magistrate who is dead, who has been slandered, it is punishable as a slander on the government.

Rex v. Topham.
4 T. Rp. 126.

And where there is an information or indictment for a libel reflecting on the memory of any person deceased, the information or indictment should state, "That it was done with a design to bring the family of the deceased into contempt, to stir up the hatred of the king's subjects against them, and excite the relations to break the peace by vindicating the honour of the family;" and therefore where indictment only stated, That the words as set forth "were to the great scandal and disgrace of the memory, reputation, and character of G. Earl Cowper, in contempt, &c. to the evil example, &c. and against the peace, &c." the judgment was arrested; for offences of this nature are punished by law, as tending to a breach of the peace, by provoking the friends of the deceased to acts of violence and revenge.

For it is necessary to be observed, that libels are punishable by *information* and *indictment*, as well as by *action*; that is, considering them as an offence against the public peace and good order of the state; and thereon is founded the distinction, that if any person is slandered by libel, *he* may have his *action* as well as an information or indictment; but a libel reflecting on a person dead, or the conduct of the king's ministers or government, *without any particular application*, is punishable only by *information* or *indictment*, as a matter of public, not of individual concern.

Rex v. Horn.
Cowp. 672.

* [508]

* As was the case here, of an information against the defendant, "for publishing an advertisement, suggesting that many of his Majesty's subjects had been murdered by his Majesty's troops in *America*, and proposing a subscription for raising a sum of money for the support of their wives and children," the people of *America* then being in open rebellion

lion to this country; the defendant was found guilty, fined, and imprisoned.

“ And on the same grounds, though the writing may not convey any slander against *any person*, yet may it be a libel, from having an *evil public tendency to corrupt the manners of the people*.”

As in this case, where an infamous and obscene book, which had been published by the defendant, was, on an information, and on solemn argument, adjudged to be a libel; and he was convicted, and stood in the pillory.

Rex v. Curl.
2 Stra. 788.
Rex v. Hill.
Ibid. cit.

“ So for the same reason, publications levelled against the *established religion* have been held to be libels.”

As where the defendant was convicted of having published four blasphemous discourses on the miracles of our Saviour, and attempting to move in arrest of judgment, the Court said they would not suffer it to be debated, whether to write against Christianity was not an offence punishable in the temporal courts at common law.

Rex v. Woolston.
2 Stra. 834.
Fitzgib. 65.
S. C.

And on the similar principles of public concern, a *treatise of hereditary right* was held to be a libel, though it contained no libel upon any part of the then subsisting government.

Regina v. Bedford.
Mich. 12 Ann.
cit. 2 Stra. 789.

“ And in like manner, any public reflection on the *administration of justice* is libellous.”

As where one *Hurry* having been maliciously prosecuted for perjury by the defendant *Watson*, and acquitted; and having afterwards recovered large damages for the malicious prosecution from him, the corporation of *Yarmouth*, of which he was a member, made an order in their books, voting to him 2300*l.* in consideration of the verdict against him, and declaring that it was done in consideration of his being actuated by motives of public justice, and preserving the rights of the corporation, and supporting the honour and credit of the chief magistrate: the Court held this to be a libel on their proceedings and the administration of justice, and made a rule absolute for an information against the defendants.

Rex v. Watson & alt.
Hil. 28 G. 3.
2 T. Rep. 199.

But a fair report in a newspaper of what passed in court on a cause, is not a libel.

Curry v. Walter.
Espin. Caf. N. P.
456.

6. “ Censures passed by sectaries against any of their body, for non-observance of the rules and ordinances of their sect, shall not be deemed libels.”

* For where the prosecutrix was a *Quaker*, who being less rigid than the rest of the sect, the brethren first admonished her, then sent deputies to her; and lastly, expelled her, and entered as a reason in their books, “ for not practising the duties of self-denial:” the Court were of opinion, That this was merely a piece of discipline, and therefore not a libel.

Rex v. Hart.
1 Bl. Rep. 386.
Post 312.

*[509]

Dibdin v. Swan.
Espin. Caf. N.P.
28.

7. It is not a libel for a newspaper to comment fairly and without malice on any place of public amusement, or any public performer.

Ashley v.
Harrison.
Espin. Caf. N.P.
48.

Neither can the proprietor of a public place maintain an action on the ground, that a performer being libelled, was thereby prevented from performing.

Though these cases on *indictments* and *informations* for libels do not properly belong to this Treatise, yet being necessary to the clear understanding of the doctrine under this head, I have thought it not improper to insert those now mentioned, and the other cases on the same head, premising those cases on the rules adopted by the Court in granting informations.

Rex v. Miles.
Dougl. 271.

As, 1st, It is a general rule that the Court will not grant an information for a private libel, charging any person with an offence, unless such person *will deny the charge upon his oath*.

Rex v. Bicker-
ton.
1 Stra. 498.

For if the party admits the libel to be true, or does not deny it, though being true does not excuse the libel, yet it is sufficient to induce the Court to leave the party to his remedy by *indictment*.

Rex v. Haswell
& Gate.
Dougl. 572.

But to this certain exceptions have been admitted:
1. Where the libel is founded on charging the prosecutor with *words delivered in parliament*, for such cannot be questioned (*Bill of Rights, 1 W. & M. sect. 2. c. 2. art. 9.*):
2dly, Where that charge is only general: 3dly, Where the party libelled is at such a distance that he cannot be had to swear, when the information is moved for by a person on his behalf.

Rex v. Lord
Abingdon.
Espin. Caf. N.P.
226.

But if a member of parliament publishes his speech in the public newspaper, and it contains charges of a slanderous nature against an individual, the Court will grant an information for the offence.

2. WHEREIN THE OFFENCE OF LIBELS CONSISTS, AND WHO ARE LIABLE TO PUNISHMENT FOR THEM.

1. "As the offence of a libel consists in being the means of propagating slander, it is essential to a libel *that it be published.*"

Rex v. Fitter
and Carr.
2 Feb. 502.

[510]

For in an information for a libel in this case, it was held, That copies of a libel being found in the defendant's chamber, was no publication or offence, *without discoursing of it, or delivering it out.*

John Lamb's
case.
3 - 0. 39. b.

So on an information for a libel in this case, it was resolved, That every one who shall be convicted of a libel ought to be a contriver of it, or a procurer of contriving it,

or

or a malicious publisher of it, knowing it to be a libel; for if one reads a libel, or hears it read, it is no publication; as before he reads it or hears it, he cannot know that it is a libel; but if after hearing or reading it, he repeats any part of it to others, or reads it to them, it is a publication of it; but if he writes a copy of it, and does not publish it to others, it is no publication of it; but this might be evidence rather against him, unless he delivered the copy to a magistrate.

“ But *writing* a libel seems to be sufficient, though the person was not concerned in the publication.”

For where in this case the jury found that the defendant did *write* the libel, but that it was dictated to him by a person unknown to him and to the jury, and that the stranger dictated the whole of the subject-matter which the defendant wrote, the Court held the defendant to be guilty, the writing being the essential part, a *making* of the libel, and so different from *transcribing* of it, as in the last case, which is not of itself an offence.

Rex v. Paine.
Carth. 405.
5 Mod. 163.
S. C.

2. Proof of the sale of a libel in the shop of a printer, is *prima facie* evidence to convict the owner of the shop of having published the libel, and must stand till contradicted, explained, or exculpated by contrary evidence; and though the copies have been sold by his servant without his knowledge, and he afterwards stops the sale, this can only be offered in mitigation of punishment.

Rex v. Almon.
5 Burr. 2687.

3. If a man sends a libel to *London* to be published, it is his act in *London* if the publication be there.

Rex v. Middleton.
1 Stra. 77.

4. And as to the *mode of publishing* a libel, it is resolved, that it may be published, 1. *Traditione*, or by handing about copies of it: 2. *Verbis aut cantilenis*, reading or singing it in the presence of others.

Cafe de Famosis Libellis.
5 Co. 155.

Writing a letter addressed only to the party libelled, is a sufficient publication *on which to ground an information or indictment*; for it tends to excite the party to break the peace, by avenging the insult or reproach.

Hick's case.
Poph. 139.

But repeating part of a libel in merriment, without malice, has been held not to be a publishing: but singing a song in ridicule, or slandering the person's character, was in this case deemed a sufficient publication.

Want's case.
Moor 127.
Rex v. Benfield & al.
2 Burr. 2666.

As where in the case of *Rex v. Hart* (*ante* 509) the sect of *Quakers* had expelled one of their members; and having entered in their book the reason for such expulsion, “ That it was for not practising the duty of self-denial;” and she sent her maid for a copy of the entry, which was delivered to her by the defendant, who was clerk of the meeting, and this was the only publication proved; the Court seemed to be of opinion that it was insufficient.

[511]

3d, The third species of Slander is called

LIBEL SINE SCRIPTIS.

5 Co. 125.

As by pictures; raising a gallows before a man's door, and hanging him in effigy, and such like.

3 Bl. Com. 125.

But as to signs and pictures, it seems necessary to shew, by proper *innuendoes* and averments, the defendant's meaning, that they are particularly applied to the plaintiff, and that some special damage has followed.

2. OF THE RULES OF CONSTRUCTION ADOPTED BY THE COURT IN CASE OF SLANDEROUS WORDS.

Bradley v.
Meffon.
Mich. 10 G. 2.
Bull. N. P. 4.

The old rule in the construction of words was, that they were always to be taken *in mitiori sensu*; but this is now exploded, and the rule is, that they *shall be taken in that sense in which they would be understood by those who hear or read them.*

But many former rules of construction agree with this: as,

1. "That *all the sentence is to be taken together*; for though "part of the words may be actionable, yet they may be so "explained by the rest, as not to bear an action."

Brittridge's case.
4 Co. 19.

As where the words were, "*Brittridge is a perjured old knave*; and that appears from a stake, parting the grounds of *H. Martin* and *Mr. Wright.*" After a verdict for the plaintiff, judgment was arrested; for though the first words "perjured old knave" are actionable, yet it must be perjury in a court of justice which is actionable; but here the subsequent words explain the words clearly not to mean judicial perjury, and the whole context, when taken together, is not actionable.

2. "Where words are spoken which bear an imputation "of slander, or with an intention to defame, the Court will "not strain to find an innocent meaning for them."

Ward v.
Reynolds.
Gilb. Rep. 243.
*[512]

* As where the defendant said to the plaintiff, "How did your husband die?" Plaintiff answered, "As you may, if it please God." The defendant replied, "No; he died of a wound you gave him." On *not guilty* pleaded, the plaintiff had a verdict, when it was moved in arrest of judgment, that the words might have an innocent meaning, as that the stroke might have been given *by accident*; but the Court said, That the words bore a scandalous meaning, and that they would not endeavour to find out how they might be spoken with an innocent meaning.

"So, on the other hand, they will not put a forced construction of guilt on words which may bear an innocent meaning."

As

As where the words were of an attorney, "He is a common maintainer of suits." They were held not to be actionable, for to maintain suits is his business; and the words shall not be construed to import a charge of *maintenance* when applied to him.

Box v. Burnaby.
Hob. 116.

3. "The words should import a *direct charge* of a slanderous nature, not by inference or conclusion, or the Court will not hold them to be actionable."

As where the words were, "*M. Stanhope* hath but one manor, and that he got by swearing and forswearing." The words were adjudged not to be actionable: 1. Because they were too general: 2. Because they did not charge the plaintiff himself with swearing and forswearing; for he might have got the manor so, and yet not be privy to the swearing or forswearing.

Stanhope v.
Blith.
4 Co. 15. a.

"Therefore the *person slandered* must always be certain, so that there can be no doubt as to the person meant."

As if one was to say, "One of the servants of J. S. (he having many) is a notorious felon or traitor;" no action lies, on account of the uncertainty of the person: but if the person is once named, as if, after conversing about J. S., one says, "He is a notorious thief;" this is actionable, for the person meant may be sufficiently ascertained by *their-nuendo*, which in the former case could not be done.

4 Co. 17. b.

4. "Where words are used with an intention to slander, though the *offence which the defendant intended to lay to the plaintiff's charge is improperly expressed*, yet may the words be actionable."

* As where the defendant said of the plaintiff, "*Twaites* has hired several persons to make false powers to receive seamen's wages." This was construed to convey a charge of *forgery*, and to be actionable, though the word *powers* is general, and may not properly mean *letters of attorney*; yet being so used in common speech, it shall be construed as intending to defame.

Twaites v.
Shaw.
Gilb. Rep. 216.
*[513.]

5. "The Court will see if the words are of such a description as import damage to the party."

As if one newspaper state of another that it was *low and scurrilous*, it is not libellous; *aliter*, to say that it was *low in circulation*, as that prevents persons from advertising in it.

Heriot v.
Stuart.
Espin. Cal.N.P.
437.

3. OF THE PLEADINGS.

1. THOSE ON THE PART OF THE PLAINTIFF.

1. "Where the words or sentence does not *of itself* contain a charge of a slanderous nature without words of *reference, or explanatory of the meaning or application*, it may be

“ be supplied by improper *innuendoes* in the declaration, as
 “ to matters or persons referred to.”

“ But as to how far the *innuendoes* are to be allowed, it
 “ has been resolved,

1. “ The office of the *innuendo* being to supply the absence
 “ of something necessary to complete the sentence, and shew
 “ the application of the words, it can never be admitted to
 “ extend their meaning beyond the import of the words
 “ themselves.”

Barham's case.
 4 Co. 20. a.
 Castleman v.
 Hobbs.
 Cro. Eliz. 428.
 S. P.

For where the words were, “ Master *Barham* did burn
 my barn,” with an *innuendo*, a *barn full of corn* (which is
 felony if there is corn in it, or it be parcel of the dwelling-
 house); the Court would not suffer the *innuendo* to imply
 that there was corn in it, when the word would not of itself
 bear so extensive a meaning.

2. “ So where the *person* is uncertain, an *innuendo* shall
 “ not make him certain.”

4 Co. 27. b.

As if one says, “ I know one near or about J. S. who is
 a notorious thief:” the person really meant cannot be sup-
 plied by an *innuendo*, when there has been no conversation
 about him; for the office of the *innuendo* is to contain and
 design the person who was named in certain before, and
 stands in the place of a *predict.*; and therefore, without some-
 thing to refer to, cannot be made certain; for it would be
 inconvenient that actions might be maintained by imagina-
 tion of an intent, which does not appear by the words on
 which the action is founded, but which is uncertain, and
 subject to deceivable conjecture.

[514]

3. “ So neither shall the words, if used generally, be ex-
 “ tended by the *innuendo* in the declaration to apply to any
 “ particular thing, so as to induce guilt from thence.”

Thomas v.
 Axworth.
 Hob. 2.
 Hervey v.
 Duckins.
 Hob. 45. S. P.

As where the words were, “ He forged a warrant,” *innu-*
endo a certain warrant, by which the sheriff was commanded
 to take *Margaret Hogg*, &c., it was held that the *innuendo*
 could not specify in such manner that which was generally
 alleged.

2. “ The next part of the declaration material to the ac-
 “ tion is the *averment*. This is where the words for which
 “ the action or information is brought are only criminal by
 “ reference to some other fact, which therefore constitutes
 “ the ground of the action, or is necessary to maintain it;
 “ in such case this matter must be expressly *averred* in the
 “ declaration or information.”

As in the case of *traders*, certain words are actionable ap-
 plied to them, which are not so when used to others; as to
 call one a bankrupt, &c. In such case it is necessary to
 aver a *colloquium* concerning such person as a trader, and
 that the words were used with that application.

So

So where the plaintiff brought an action, for the defendant's having said, "That he was indicted for felony at a sessions holden," &c., but did not aver that he had not been indicted; after a verdict for the plaintiff, judgment was arrested for want of this averment; for if he was not indicted, there was no crime.

Bland's case.
Hob. 309.

In like manner in the case of *libels*, the same averments are necessary; and in this case judgment was arrested, because it was not laid that the libel was *of and concerning the plaintiff*.

Lowfield v.
Bancroft.
2 Stra. 934.

So where the libel was an advertisement, reciting certain orders made for collecting money on account of the distemper among the horned cattle in *Suffolk*, and it charged that the money so collected had been improperly applied, and the information charged this to be a libel on the justices of *Suffolk*; but in the body of the libel no mention was made of the justices of *Suffolk*, nor did the information, in the introductory part, say that it was a libel *of and concerning them*; and though in the body of the information when any order was mentioned, there was an *innuendo*, that it was an order of the justices of *Suffolk*: but judgment was arrested for want of the averment, the *innuendoes* not explaining sufficiently the matter, there being nothing to refer to.

Rex v. Alderton.
Sayer's Rep.
280.

* But where the information was for a libel "*of and concerning the King's government*," these words were adjudged to be a sufficient introductory averment to support the information by reference of the subsequent matter to them.

Rex v. Horne.
Cowp. 672.

* [515]

"But where the words charge a crime, which words are *of themselves actionable*, it seems that in such case an averment that the crime was not committed, is not necessary."

As where the words were, "I will call him in question for poisoning my aunt; and I make no doubt to prove it." After verdict for the plaintiff, it was moved in arrest of judgment, That it was not averred, that in fact the defendant's aunt was poisoned: but *Curia contra*, for the plaintiff's character is impeached though he never did such a fact.

Webb v. Poor.
Cro. Eliz. 569.

3. In an action by a *trader* for actionable words, as for calling him *bankrupt*, for example, the declaration should state, "That he was a trader, and used the trade of," &c.; for where in this case the plaintiff only declared that he used the *art and mystery* of a baker, judgment was arrested, as it might be only for the use of his own family.

Hawkins v.
Cutts.
Hutt. 49.

So he should also state in his declaration, "That he gained *his living* by buying and selling;" for in this case, for want of such averment, judgment was arrested: for such traders only are within the bankrupt laws.

Emerson v.
1 Sid. 299.

So the declaration should state, "That *at the time of the words spoken* he was a trader."

Dotter v. Ford.
Cro. Eliz. 794.

For where in this case the plaintiff only declared, "That he was of good fame, & *per multos annos retroactos* was a merchant," &c., the Court inclined to think the declaration ill, as the words did not sufficiently shew that he was then a merchant, as he might have been so for many years past, but have left off trade.

And these several matters must be proved at the trial.

Coleman & ux.
v. Harcourt.
1 Lev. 140.

4. If an action is brought for calling the plaintiff's wife a bawd, *per quod* J. S. left off coming to the house, the special damage being the gift of the action, which is the husband's only, it ought not to be laid *ad damnum ipsorum*: but where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion is right, for the action survives.

Grove & ux.
v. Hart.
Trin. 25 G. 2.
Bull. N. P. 7.

Ibid.

And *note*, That saying generally, *per quod* several persons left the house, without naming any in particular, is not special damage.

Regina v.
Drake.
Salk. 660.
*[516]

* 5. In setting out the words, or the tenor of words, in the declaration in this action, there is a difference between words spoken and words written. Of words spoken there cannot be a tenor, for there is no original to compare them to, as in the case of words written; therefore in the declaration for *words spoken*, variance in the omission or addition of a word is not material; it is *sufficient if so many be proved and found as are actionable*. But it is otherwise in the case of words written; for though in describing a libel or other writing, there are two ways of pleading, either by the words, saying *cujus tenor sequitur*, or *in hæc verba*, &c., or by the sense; if you declare on the words themselves, any variance or mistake is fatal, for *tenor* means a transcript or true copy: but in declaring on the sense, such an adherence is not required, and a variance is not fatal.

Ibid.

Therefore where the declaration was for a libel *secundum tenorem sequentem*, and in setting out the sentence, *nor* was inserted for *not*; though the sense remained the same, the variance was held to be fatal.

6. "As it is essential to a libel that it be *published*, it is therefore necessary that *that* should appear from the declaration; but the word *published* is not essential, nor is there any technical form of words necessary, if it appears by any means either from the particular case, or in any manner that the libel was published."

Ealdwin v.
Elphinstone, in
Excheq. Chamb.
2 Jack. Rep.
1037.

As where the count in the declaration was "*for printing, or causing to be printed*, a libel against the defendant in error, *in a newspaper*," and the error assigned was, the want of the averment

avermment of publication; the Court held, That the fact of printing a libel, though it might be an innocent act, yet, unless qualified by circumstances, should *prima facie* be understood to be a publishing, as it must be delivered to the compositor, workmen, &c.; but printing in a newspaper admits of no doubt on the face of it, and shall be intended to be a publication, unless the defendant shall shew that it was suppressed and never published: the Court therefore gave judgment for the defendant in error.

7. The plaintiff need not in his declaration aver, "That the words or charge was *not true*," for that is supplied by the general allegation in the declaration, that the defendant published them *falsely and maliciously*.

Carpenter v. Farrant.
Mich. 10 G. 2.
B. R.
Bull. N P. 8.

8. Where the libel has been published in different counties, the Court will not change the venue into any one of them, as where it is published in a newspaper, which "circulates into many places;" for the defendant cannot say in his affidavit, "That the cause of action arose in such a county, and not elsewhere."

Pinkney v. Collins.
4 T. Rep. 571.
Clifford v. Clifford.
1 T. Rep. 647.

* But where the libel was in a letter, written from a place in the county to which it was moved to change the venue to another place in the same county, there the Court changed the venue; for *the cause of action arose in that county only*.

Freeman v. Norris.
3 T. Rep. 308.
* [517]

So where the libel was a letter written in Yorkshire to a person in Germany, the Court changed the venue to Yorkshire; for the only part of the transaction, out of which the cause of action arose, which happened in England, was in Yorkshire, though the actual publication was in Germany.

Metcalf v. Markham.
3 T. Rep. 652.

9. Where the libel is in a foreign language, the words should be set out as in the original in that language in the declaration: for where they were in the French language, but set out according to their purport and effect in the English language, the judgment was arrested, after a verdict for the plaintiff.

Zenobio v. Axtell.
6 T. Rep. 162.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. The *general issue* in this action is *not guilty*, or a denial that the defendant spoke the words in question; or, if spoken, that they were not actionable.

2. Several special *pleas in justification* are good, which admit the fact, but deny the slander or defamatory intention.

As the defendant may plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question; so that he may justify the speaking

Brook v. Montague.
Cro. Jac. 91.

ing them through concern, or the reading them as a story out of an history; or he may shew from the dialogue that they were spoken in a sense not defamatory; or he may give these matters in evidence on the general issue, for they prove him not guilty of the words *maliciously*.

“ And the defendant may justify by shewing the *application* of the words used not to be slanderous, though they “ would otherwise import slander.”

4 Co. 13. b.
14. a.

As where they were for calling the plaintiff “ murderer,” the defendant may shew that it was in a conversation concerning the killing of hares, of which the plaintiff having said that he had killed so many, that the defendant then said that he was a murderer; but *meant of hares*.

“ But it is no justification of slanderous words *that the defendant heard them from another person* if he repeated them; for every one is answerable for the slander which “ he himself propagates of another.”

Anon.
G. Hall, 1752.
Bull. N. P. 10.

[518]

As where this action was brought by the captain of a ship against a merchant of *Bristol*, for saying that his vessel was seized, and he put into prison at ———, for smuggling corn: Ch. Just. *Lee* held, That proof of the defendant's *having heard it read out of a letter, and that he only reported the story*, was no justification; but that he was answerable for the reports which he propagated; and the jury gave 500*l.* damages.

Davis v. Lewis.
7 T. Rep. 17.

With respect to words which the party speaking them may have heard from another, the rule is this: If a person say that such a man (naming him) told him certain slander, and that man did in fact tell him so, it is a good justification; for that person who uttered the slander ought to be sued; but if he utter the slander without adding who told them, it is actionable: and it is not sufficient for the defendant to disclose in his plea from whom he heard them, as the plaintiff is then put to the expence of his action, and he must sue the person from whom he heard them.

Powell v.
Munkett.
Cro. Car. 38.

So it is no justification of slanderous words that the defendant, *suspecting* the plaintiff to have been guilty of the fact concerning which the words were spoken, had so used them concerning him.

5 Co. 125.
Doug. 373.

3. “ The defendant may plead that the *words were true*; “ for if so, it is *damnum absque injuria*: and the truth of the “ words must always be *pleaded*.”

Underwood
v. Parks.
2 Stra. 1200.

For where in an action for words the defendant *pleaded not guilty*, and offered to prove *the words to be true* in mitigation of damages, the Chief Justice refused to permit him, saying, that the judges had then come to a resolution *never to permit the truth of the words to be given in evidence under the general*

general issue, but that it should always be pleaded; whereby the plaintiff might be prepared to defend himself, as well as prepared to prove the speaking of the words.

“ But if the plaintiff, after proving the words laid, goes into evidence of other words, which shew the defendant’s ill-will to him, the defendant shall be allowed to give the truth of these words in evidence.”

As where the plaintiff brought an action against the defendant for saying, “ He was a buggerer, and that he caught him in the fact.” After proving the words, the plaintiff gave in evidence, that at another time the defendant had said, “ That he was guilty of sodomitical practices.” Just. *Burnet* permitted the defendant to give the truth of these words in evidence; for the action not being brought for the speaking of them, the defendant had no opportunity of pleading that they were true; and being given in evidence in aggravation, the defendant ought to be permitted to shew that they were true in mitigation.

Collison v. Loder, at Oxford, 1750. Bull. N. P.

In the case of a libel where the *proceeding is by action*, the defendant may *plead that the words are true*: *aliter* where the proceeding is by information or indictment. Hob. 253.

And where the libel contains a charge of fraud or crimes against the plaintiff, the pleas should state what cases of fraud or crime the defendant means to rely on, for so only can the plaintiff be prepared to meet them with evidence.

As where the libel was for publishing of the defendant in the newspaper, “ That he was at the head of a gang of swindlers,” and the defendant pleaded the truth of the words generally; it was resolved on demurrer, that the defendant should have stated the particular instances of swindling and fraud on which he meant to rely.

PAnson v. Stewart. 1 T. Rep. 74.

4. “ A recovery of damages in a former action for the same words, is a good plea in bar.” [519]

And where a person has once recovered damages in an action for words, he cannot afterwards have another action on account of *special damage*; as the loss of preferment, &c., which may afterwards arise in consequence of the words.

Per Cur. Caf. K. B. 544.

Neither shall the plaintiff by any variation, omission, alteration, or explanation, be allowed to vary the words, so as to sustain another action; but the former recovery shall be held a sufficient bar.

Gardiner v. Helwis. 3 Lev. 248.

5. “ Another good plea in this action is *accord and satisfaction*.”

“ But this must be executed, and a *valuable consideration* in law.”

Davis v.
Ockham.
Style 245.

For where to an action for words, the defendant pleaded an agreement between him and the plaintiff, *that the plaintiff having done a trespass, that it was agreed that one action should be set against another.* On demurrer, the plea was ruled to be a bad one.

Covill v.
Geoffrey.
2 Rep. 96.

So where to a like action the defendant pleaded an agreement between him and the plaintiff, that he should confess the wrong, and ask the plaintiff's pardon on his knees; it was adjudged to be an insufficient plea, for the consideration was of no value in law.

6. The *statute of limitations* is another plea in bar: as to which it is enacted by stat. 21 Jac. 1. c. 16. "That actions for words must be commenced within *two years* after the words have been spoken."

Litt. Rep. 342.

Upon this statute it has been held,

Saunders v.
Edwards.
1 Sid. 95.

1. That it extends not to actions for *scandalum magnatum*.

2. Neither does it extend to cases in which *the special damage is the gift of the action*, according to this distinction, viz. where the words are themselves actionable, there the damages shall be held to refer to the words themselves, and not to any special damage; and in such case the statute is a good bar. But where the words are not actionable without special damage, there the statute of limitations is no bar, for the action is for the special damage arising from the words, not for the words themselves.

Law v.
Harwood.
Cro. Car. 141.

3. This action extends not to *slander of title*, for that is not properly slander, but a cause of damage, and the slander intended by the statute is of the *person*.

[520]

OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

Geare v. Britton.
Per Lee, C. J.
Mich. 1746.
Bull. N. P. 7.

1. Though *the words are in themselves actionable*, the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration: but after he has proved the words as laid, he may give evidence of other expressions used by the defendant as a proof of his ill-will towards him.

Snellger v.
Shelley.
Somerfet Sum.
Aff. 1780.
MSS.
Charlter v.
Barret.
Peake's N. P. C.
22.

As where in an action for words, which were proved, the plaintiff's counsel offered evidence of the *same words spoken on days subsequent to that laid in the declaration*: it was objected for the defendant that this could not be done, because the plaintiff might have brought another action for them, and words actionable in themselves could not be given in evidence in aggravation of damages. Mr. Just. Nares agreed that *different words, actionable in themselves*, could not be given in evidence by way of aggravation; but that the same words might, though spoken at different days. He said this had been the practice, and with good reason; for an action for

for words spoken but once, would in most cases be deemed frivolous, as they might so be spoken in a heat; and therefore a plaintiff is often under the necessity of proving the slander repeated, in order to shew that it was malicious.

So in such case of words actionable, whatever special damage is laid the plaintiff may go into evidence of it, but not more: as where the words were, "You are a thief, and I'll prove you so," with a *per quod*, that by reason of them one *John Merry*, and divers others, left off dealing with him; the Chief Justice allowed the plaintiff to go into evidence as to *Merry*, but not as to the rest.

Per Lord Raymond,
Browning v. Newman.
1 Stra. 666.

Quere tamen, If the plaintiff, having proved the actionable words as laid, is at liberty to give in evidence other words, unless they are *not of themselves actionable*?

Mead v.
Daubigny.
Peake's N.P.C.
125.

2. But if plaintiff declares for *words not actionable*, and lays special damage; if the plaintiff does not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gift of the action. But where the words are themselves actionable, and special damage is also laid; if the words be proved, the jury must find for the plaintiff, though the special damage is not proved.

Guest v. Loyd.
Bull. N.P. 6.

In the case of *Browning v. Newman* (*supra*) it is said, that where the words were not in themselves actionable, but the special damage is the gift of the action, plaintiff may go into evidence of particular damages not specified in the declaration. But Just. Buller makes a *quare* if it is supported by modern practice.

[521]

But in general where special damage is laid, the evidence must correspond with it. As where the special damage laid was, loss of marriage with *J. N.*, Lord Holt refused to let plaintiff go into evidence of loss of marriage with any body but *J. N.*

Anon.
2 Ld. Raym.
1007.

3. "It was formerly holden, that the plaintiff was obliged to prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient to prove the *substance* of them: but the sense, as well as manner of speaking them, must be the same."

2 Roll. Ab. 718.
Bull. N.P. 5.

As where the words were laid in the third person, "He deserves to be hanged for a note he forged on *A.*;" proof that the words were used in the second person, "*You deserve,*" &c., was held not to support the declaration; for there is a difference between words spoken in a passion to a man's face, and spoken deliberately behind his back, the first being more excusable.

Avarillo v.
Rogers.
G. Hall Sitings
Trin. 1773,
before Lord
Mansfield.
Bull. N.P. 5.

So in an indictment, the words were laid to be spoken of a justice of peace in the execution of his office: at the trial the justice was the prosecutor, and proved the words spoken,

Rex v. Berry.
4 T. Rep. 217.

but that they were spoken *to* him : it was admitted that this was such a variance, that the defendant must be acquitted.

Salk. 694.

4. If a colloquium is necessary to support the action, (as in the case of words applied to a trader,) it must be proved; and for that fault in this case judgment was arrested.

Per Just. Den-
ton, at Stafford,
3729.
Bull. N. P. 5.

So it has been held, That if the words are laid to have been spoken at a particular place, the place not being laid as a venue, but as a description of the offence, that it ought to be proved. *Sed quare?*

Jennings v.
Hankin.
2 Lev. 121.
Craft v. Borito.
Saund. 247.

As in the case of a justification, which if it be local; as where the words were, "That plaintiff stole plate at Oxford," it seems that the trial ought regularly to be there; but this would be cured by a verdict.

5. "Where the words are actionable, as referring to the person's profession or business, though it must be proved that the plaintiff was of the business or profession laid in the declaration; yet it seems sufficient to prove him so by reputation."

Berryman v.
Wife.
4 T. Rep. 366.
[522]

As where the action was by an attorney, charging him with having swindled a person out of a sum of money, by whom he had been employed in a certain suit, and threatening to have him struck off the roll: the plaintiff proved the words, and also his having been employed as attorney in that and several other suits. It was objected for the defendant, that the plaintiff should have proved that he was an attorney, *by producing a copy of the roll of attorneys*; but the judge was of opinion that the evidence offered was sufficient; and on a motion for a new trial the Court concurred with the judge.

Rex v. Topham.
4 T. Rep. 126.

6. In an information, indictment, or action for a libel published in a newspaper, proof that the defendant gave bond at the Stamp Office for the duties on advertisements published in that paper, and had occasionally applied there respecting it, is evidence sufficient to fix him as publisher.

Heriot v.
Stuart.
Espin. Cas. N. P.
437.

Where in an action for a libel the plaintiff stated himself to be proprietor and editor of a certain newspaper; on the evidence it appeared, that another person was the editor so called at the office of the paper, though he attended and revised the paper before publication; it was held to be a fatal variance.

Rex v. Hall.
2 Stra. 417.

7. In an information for a libel, the witness for the prosecution proved, that it was shewn to the defendant, who confessed that he was the author, *errors excepted*: it was objected that this confession, not being absolute, in fact amounted to a denial that that was the very book charged, and so could not be given in evidence; but the Chief Justice admitted

admitted it, saying, that he would put the defendant upon proving that there were material variances.

8. On an information for a libel, the defendant cannot give in evidence, that a paper similar to that for which he is prosecuted was published by other persons at a former time, which persons have never been prosecuted for it. Rex v. Holt.
5 T. Rep. 436.

4. OF THE VERDICT, JUDGMENT, AND COSTS.

I. AS TO THE VERDICT AND JUDGMENT.

1. "Though all the actionable words laid in any one count of the declaration be not proved, yet *if any actionable words are proved*, damages shall be given for those." Compagnon v.
Martyn.
2 Bl. Rep. 790.
& Cal. ibid.

As where the words were, "I have been to *Newgate* to see a poor young fellow, who is going to be wrongfully transported by a very base woman (*innuendo* the plaintiff's wife); she got a person to arrest him falsely for a debt of 10*l.*, and was not content with that, but she afterwards swore a *false* debt against him for 100*l.*, and has sworn a robbery against him, and transported him falsely." The defendant pleaded the general issue, and at the trial all the words were proved, except as to the words, "*she swore a false debt.*" The Chief Justice directed the jury not to give damages for the words not proved, but to give them for the rest; and they did so. On a motion to set aside the verdict, the Court held the judge's direction to be right.

* 2. In an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and the jury find a general verdict, if there was any evidence which applied to the bad counts, it being impossible to say how the jury apportioned the damages to the counts, and which they found; there the Court will grant a *venire facias de novo*: but where the evidence applied at the trial only to the good counts, there a general verdict may be altered from the judge's notes. Auger v.
Wilkins.
Barnes 478.
Per Justice
Buller.
Doug. 362.
*[523]

But if these words are in one count only, the Court will intend that such as were not actionable were only added to shew the malice of the party, and that the damages only were given for such as were actionable. In Osborne's
case.
10 Co. 130. b.

But if the jury find a general verdict *on particular counts*, and damages entire, and any of them is bad, the judgment in that case shall be arrested. Onslow v.
Horne.
3 Will. 177.

2. As to the *Costs* in this action.

It is enacted by stat. 21 Jac. 1. c. 16. "That in actions for words, if the jury give damages under forty shillings, that the plaintiff shall have no more costs than damages."

On

On this statute it has been decided,

Brown v.
Gibbons.
1 Salk. 206.

1. Where *the words are not of themselves actionable*, but the consequential damages are the gift of the action, (as here, for calling the plaintiff's wife a whore, *per quod* she lost her customers,) though the damages are under forty shillings, yet the plaintiff shall have his full costs; for it is not the words but the special damage which is the cause of action in this case.

Brown v.
Gibbons.
1 Salk. 206.

But it was further held in this case, that though the Court are bound by stat. 21 Jac. 1., and cannot increase the costs where the damages are under forty shillings; yet the jury are not bound by the statute, and may give 10% costs where they give but ten-pence damages.

Burry v. Perry.
2 Ld. Raym.
1588.
2 Stra. 936.
S. C.
3 Burr. 1688.
S. P.

2. But where the *words are actionable of themselves*, and special damage is laid, if the damages are under forty shillings, the plaintiff shall have no more costs than damages; for the action is *for words*, though the special damage is also laid.

It has been said, that in a case of *Denny v. Wigg*, Bull. N. P. 10. this doctrine had been over-ruled.

Collier v.
Galliard.
2 Black. Rep.
3062.

* But in this case, from *Blackstone's Rep.* which was in the *Common Pleas*, the doctrine was admitted, and held to be the express law on the subject.

* [524]

3. "So where any other distinct offence is coupled with an action for words, if there is a general verdict, it is not within the statute."

Carter v. Fish.
3 Stra. 645.

As where the action was for words, *and also* for procuring the plaintiff to be taken and brought before a justice of peace: verdict for the plaintiff, and damages two shillings and sixpence. It was held, that the plaintiff should have his full costs; for it was not an action for words only, and the rest aggravation, but for two distinct offences.

Drury v. Fitch.
Hutt. 16.

4. In an action for words not actionable, the plaintiff was nonsuited. It was moved that the defendant should have no costs, as they should only be given where the plaintiff could have, if he recovered, which here he could not, as the words were not actionable; but the Court over-ruled the distinction, and the defendant had his costs.

CHAPTER XI.

The Action of Malicious Prosecution.

THIS is an action whereby damages are recovered for any action against or prosecution of any one, either by suit, indictment, or other legal process, where such action or prosecution appears to arise from any corrupt motive, and to be without any ground or cause for the same.

In treating of this action, I shall first consider, For what Suits or Prosecutions it lies. 2dly, Of Actions on the Case, in the Nature of a Conspiracy. 3dly, Of the Pleadings. 4thly, Of the Evidence. 5thly, Of the Damages.

1st, FOR WHAT SUITS OR PROSECUTIONS THIS ACTION LIES.

1. To bring a *civil action*, though the plaintiff has no grounds, is not actionable, because it is a claim of right, and the plaintiff finds pledges of prosecuting, is amerceable *pro falso clamore*, and is liable to costs.

Savill v.
Roberts.
Salk. 13.

But to this as a rule are certain exceptions.

1. "As if a person for the purpose of vexation, and of holding a person in custody, sues him for a *greater debt than is really due*: as by such means he may suffer long imprisonment from inability to find bail."

As where the plaintiff declared, that being indebted to the defendant *only in the sum of 40l.*, that he, for the purpose of holding him to excessive bail, and so keeping him in gaol, sued out a writ, and had *him held to bail for 5000 l.* in consequence of which he was for several days detained in gaol. The plaintiff recovered for this special injury, and had judgment accordingly.

Daw v. Swaine;
1 Sid. 424.

*So where the plaintiff declared, "That the defendant *not having any cause of action*, had caused the plaintiff to be arrested for 300 l., whereby he was detained in prison for a long time," &c. The plaintiff recovered for the injury.

Skinner v.
Gunton & al.
1 Saund. 228.
*[526]

But in such case it has been held, That the action will not lie for arresting the plaintiff without cause of action, if he be not held to excessive bail.

Neal v. Spencer.
Cal. K. B. 257.

2. Where there is a good cause of action; as where a debt is really and *bonâ fide due*, but a *stranger*, without the *privity*

Salk. 14.
Thurston v.
Eunnes.
March 47.

privily of the person to whom the money is due, sues out a writ and arrests the debtor for it, he may maintain an action for it, though he was then actually liable to be sued by the real creditor; the party who made the arrest having no cause of action himself, nor authority from the real creditor.

3. "Where there is a good cause of action, but the plaintiff sues in a court which has not cognizance of the cause, this action will lie: but in such case it seems that it should appear that the plaintiff knew that the court had not cognizance of the cause."

Goslin v.
Wilcock.
2 Willf. 302.

As where the action was brought for arresting the plaintiff in this action by process out of the court of *Bridgewater*, when the cause of action did not arise within its jurisdiction, and the plaintiff recovered: on a motion for a new trial, the Court were of opinion, That the mere suing of a person in an inferior court not possessing jurisdiction, was not of itself a sufficient foundation for this action, *unless it appeared that that circumstance was known to the plaintiff* in that action, and also some degree of malice appeared: as here, the cause of action arising in *Taunton*, where the plaintiff might have been sued, but the defendant arrested him publicly at a fair at *Bridgewater*.

Atwood v.
Monger.
Style 378.

So where the action was for causing a false presentment to be made against the plaintiff before the conservators of the river *Thames*, in a matter which did not appear to be within their jurisdiction, this action was held well to lie.

"So for suing a man in the ecclesiastical court for matters not cognizable there, this action lies."

Waterhouse
v. Bawd.
Cro. Jac. 133.

[527]

But in such case the court must want *original jurisdiction* of the cause; for the action will not lie if the action is from its nature suable there, but happens to be barred by the defendant's plea. As if it was for *tithes of wood*, which afterwards appeared to be *timber*, for which no tithe is due: suits for *tithes generally*, being suable in the ecclesiastical court, but not tithes of *timber*.

Hob. 260.

4. "Though the action be brought in the proper court, yet may this action be maintained, if the *suit or proceeding* is utterly without ground, and that known to the person himself, for the undue vexation and damage to the plaintiff."

Waterer v.
Freeman.
Hob. 260, 266.

As where the defendant had sued out a second *fieri facias*, and sold the plaintiff's goods, *though he had taken before other goods under a former fieri facias*, and in this case it was moved in arrest of judgment, that this having been a civil proceeding, that the action would not lie; but the Court held, that the former *fieri facias* being known to the defendant, that this second one was clearly malicious: but if he had not known of the first *fieri facias*, that the action would not have lain.

5. So this action was held to lie for suing the plaintiff in the spiritual court, and causing him to be excommunicated *false fraudulenter & malitiose, without giving him notice.*

Hocking v. Matthews.
1 Vent. 86.
1 Lev. 292.

6. "It is not necessary that the first action should have been *heard* and decided in the defendant's favour; for this action equally lies *for any groundless proceedings whatsoever.*"

For where the plaintiff declared that the defendant, intending to deprive him of his liberty without any probable grounds, sued out a writ of privilege out of C. B., and after an appearance put in by the plaintiff, that defendant, knowing he had no probable cause, suffered himself to be *non-suited*, the action was adjudged well to lie.

Martin v. Lincoln.
Mich. 27 Car. 2.
C. B.
Bull. N. P. 13.

7. "But when this action is brought on the ground of a former civil suit having been commenced against the plaintiff, it is to be observed,"

1. That this action must not be brought till the former action has been determined; because till then it cannot appear that the first action was unjust. 2. That there must not only be a thing done amiss, but also a damage either already fallen upon the party or else inevitable.

Farrell v. Nunn.
B. R. Trin.
5 Geo. 3.
Bull. N. P. 13.

2. "Such are the restrictions under which this action may be brought for *civil suits*: but it also lies for a malicious preferring of an *indictment, information, or presentment* against any one."

[528]

1. If a man is indicted for any crime that may *injure his reputation or fame*, he may have this action; for he is falsely scandalized by the malice of his prosecutor, and this is a damage, and for which the law gives an action. 2. If a man is indicted for any offence that subjects him to *peril of life or liberty, and for which he may be punished*, he may bring this action, for he is endangered in that respect, and receives a damage. 3. If a man be falsely and maliciously indicted, though it neither touches his fame nor liberty, yet may he have this action *for the expence and injury to his property* in defending himself on the indictment.

Savill v. Roberts.
Salk 13.
2 Ref.

Upon these several cases it is to be observed,

1. That this action will lie *though the indictment is bad, so that the party could not have been convicted on it*; as where it was for perjury, and the perjury was so ill assigned, that an exception was taken to it by the judge, and the party acquitted without examining any witnesses; yet this action was held well to lie, the indictment serving all the purposes of malice, by putting the party to expence and exposing him.

Chambers v. Robinson.
1 Stra. 1691.
Jones v. Gwynne,
Gilb. Rep.
Trin. 11 Ann.

Therefore when the plaintiff had been indicted *as constable*, for permitting a prisoner to escape, and had been acquitted

Wicks v. Fentham.
4 T. Rep. 248.

MALICIOUS PROSECUTION.

acquitted for *want of form*, he being *headborough* and not constable, and having brought an action for malicious prosecution, was nonsuited, the judge being of opinion, *That the action could not be maintained, as he had not been acquitted on the merits*; the nonsuit was set aside, the Court holding the above doctrine to be the clear law on the subject.

Payne v. Porter.
Cro. Jac. 490.
Salk. 14.

2. If the indictment has been not found by the grand jury, yet may this action be maintained; for by the preferring the indictment the party has been exposed, harassed, and put to expence.

3. "*Expence alone will be sufficient to maintain this action.*"

Smith v.
Hixson.
2 Stra. 977.

For where this action was brought for maliciously prosecuting the plaintiff and his wife for receiving stolen goods; and on *not guilty* pleaded, the jury found for the defendant as to prosecuting the husband, and for the plaintiff as to the prosecution of the wife; and it was moved in arrest of judgment, that the husband should not have judgment on this, as the wife should be joined: but the Court held, That the expence alone which the husband had been at in her defence would support the action, though he himself was in no danger.

[529]

Bull. N. P. 14.

3. "But in general, in all cases in which this action is brought, the plaintiff must shew *malice in the defendant*, and *want of a probable cause*; and *both must concur*."

Per cur.
4 Burr. 1974.
Per Lord
Mansfield, in
Johnstone v.
Sutton.
1 T. Rep. 544.

But from the want of a probable cause, malice may be, and most commonly is implied: but from the most express malice the want of a probable cause cannot be implied. For a man from a malicious motive may take up a prosecution, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this action.

"In trials therefore in this action, if the plaintiff can prove either from the circumstances of the case, as from having a verdict, an acquittal, &c., that the action or prosecution was groundless, and so that there was no probable cause, it shall be sufficient, unless the defendant can shew satisfactorily to the court, that there was a probable cause."

Reynolds v.
Kennedy.
1 Will. 232.

As where the plaintiff brought this action against the defendant for having seized sixty-one hogheads of brandy on board his ship, which brandy was condemned by the sub-commissioners of excise, but which condemnation *was reversed by the commissioners of appeal*. After a verdict for the plaintiff, judgment was arrested; for *the brandy having been condemned by the sub-commissioners of excise*, shewed that there was some probable cause for the seizure, so that one ground of

of this action failed, viz. the want of a probable cause; and the defendant had judgment.

So where the action was for putting the defendant under an arrest on board his own ship for disobedience of orders, of which he was afterwards acquitted by sentence of a court martial, and the plaintiff had a verdict: it being for a matter properly cognizable by a court martial, and for which some probable cause appeared, the judgment was arrested.

Johnstone v. Sutton, in error.
1 T. Rep. 493.

“ And what shall be deemed a probable cause, is matter upon which the court shall decide, not the jury.”

As in the two cases last mentioned.

So where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury, and obtained a verdict: upon a motion for a new trial, the Court set the former verdict aside, it appearing from the notes of the judge, that there was a probable cause; not as being a verdict against evidence, but against law.

Golding v. Crowle.
Mich. 25 G. 2.
Bull. N. P. 14.
[530]

And note, That where a justice of peace, without any regular information before him, grants a warrant to apprehend a person on a supposed charge of felony, and commits him to prison on such charge, this action will not lie: for the immediate act, the arrest and imprisonment, is the offence, and therefore the action should be trespass *vi & armis*.

Morgan v. Hughes.
2 T. Rep. 225.

2d, OF AN ACTION ON THE CASE IN THE NATURE OF A CONSPIRACY.

An action on the case in the nature of a conspiracy, lies where two or more combine for the purpose of preferring indictments, charging crimes against any one without foundation, or otherwise conspiring to prejudice a man wrongfully, either in person, fame, or property.

Finch's Law.
305.

1. There are four incidents to a conspiracy. 1. It ought to be disclosed by some manner of prosecution, or by making of bonds or promises to one another. 2. It ought to be malicious for unjust revenge. 3. It ought to be false against the innocent. 4. It ought to be out of court voluntarily.

The Poulterers case.
9 Co. 55. b.

2. “ But there is a distinction between an action of conspiracy, properly so called, and an indictment for a conspiracy.”

1. “ An action of conspiracy, properly so called, lies not unless the party has been indicted & *legitimo modo acquiescitur*, for so are the words of the writ; but it seems that an indictment for a conspiracy will lie where there has been a false conspiracy among many, though nothing has been put in execution.”

9 Co. 56. b.

“ So there is a difference between an action of conspiracy
“ and an action on the case in the nature of a conspiracy.”

Subley v. Mott.
2 Wils. 210.

For if an action of conspiracy is against two or more, *if all but one are acquitted*, judgment shall not go against him: but where the action is case in the nature of a conspiracy, against two or more, then *one only may be found guilty*.

[531]

Mills v. Mills.
Cro. Car. 239.
241.

3. “ And this being in fact an action for malicious prosecution, with this difference, that an action for a malicious prosecution may be brought against one only; but “ an action on the case in the nature of a conspiracy, must “ be against more than one, or against one, charging that “ he, together with J. S. or others, had conspired to indict “ the plaintiff, or charge him with a crime, the grounds of “ the action therefore are the same.”

Skinner v.
Gunter & al.
Vent. 12.

As where an action on the case, in the nature of a conspiracy, was brought against the defendants for causing the plaintiff to be arrested, and held to bail, where there was no cause of action, the plaintiff recovered.

Hord v.
Cordery.
Hutt. 49.

So though the bill of indictment has *been* not found by the grand jury, yet this action will lie for the conspiracy, as before, in the case of malicious prosecution.

3. OF THE PLEADINGS AND EVIDENCE.

AND FIRST ON THE PART OF THE PLAINTIFF.

Farrel v. Nunn.
Pasch. 1712.
Bull. N. P. 14.

1. “ As this action is founded on the injury received “ from a groundless or malicious suit or prosecution, it “ must therefore appear to the court to have been ground- “ less. The declaration therefore should always state that “ the suit or prosecution had been decided in favour of the “ plaintiff, for from the acquittal or discharge, the pre- “ sumption is in favour of the plaintiff’s innocence; and “ till acquittal, it cannot appear that the first was unjust.”

Fisher v.
Bristow.
Doug. 205.

As where this action was brought for a malicious presentment of the plaintiff for incest, in the ecclesiastical court of *Huntingdon*: on demurrer to the declaration, it was held to be bad, it not being stated *that the prosecution was disposed of and at an end, and not still depending*; for so a man might be found guilty in the prosecution, and yet recover in this action.

Lewis v. Farrel.
1 Stra. 114.

So where the action was for maliciously preferring an indictment against the plaintiff; on demurrer for cause, *That it was not stated how the indictment was disposed of*, the defendant had judgment.

And

And it is not sufficient to say, "That the plaintiff was discharged from his imprisonment;" it should state the prosecution to be at an end: for a man may be discharged though not acquitted.

*But the defendant should *take advantage* of the not setting out the decision of the case in the declaration *by plea*, for it will be cured by a verdict.

2. If this action is brought for maliciously holding the defendant to bail, the declaration should state, "That the plaintiff being indebted to the defendant *in such a sum*, that defendant had sued out a writ for so much *more*, on purpose to hold him to bail in that action;" it is not sufficient to say, "That defendant caused him to be arrested, and though he offered a common appearance, yet that he held him to bail where no bail by law was required;" for otherwise the extent of the injury does not appear.

3. "Where the declaration sets out the proceedings to have been in a court that had authority of the subject matter, it need not exactly copy the *style of the court*, as set out in the record; though if a *court of a different authority* had been described, it would be bad."

Therefore where the declaration in this action stated, "That at a *general quarter sessions of the peace for Middlesex*, the defendant had indicted the plaintiff, of which he was afterwards acquitted," &c. On producing the record in court, it appeared that the indictment was found at the *general sessions* only; the plaintiff at the trial was nonsuited for the variance; but the Court set the nonsuit aside, the sessions appearing to be the same.

But where the malicious prosecution complained of has been by indictment, the declaration should correspond substantially with the indictment, and therefore where the indictment had been for stealing *unum furticulum*, and the declaration laid it for stealing *unum furticulum*, the variance was held to be fatal.

4. "For as the declaration in this action sets out all the proceedings in the former suit on which this action is founded, any misrecital is fatal, if in a material part."

For where the declaration stated, 1st, That the indictment was preferred in the year of the reign of *George III. king of Great Britain*, &c., and the indictment produced was king *over Great Britain*. 2dly, It stated, That the indictment was *against the peace*, &c.; but in the indictment produced, these words were wanting. 3dly, it stated, That the indictment was preferred and tried at a sessions holden before the *justices in and for the said county*; and in the indictment it was only the *justices in the said county*: these

Morgan v.
Hughes.
Hil. 28 G. 3.
2 T. Rep. 225.

Skinner v.
Gunter.
Saund. 228.

*[532]

Robins v.
Robins.
Salkeld 15.

Parns v.
Constantine.
Cro. Jac. 32.

Bushy v. Watson.
2 Black. Rep.
1050.

Anon.
Case K. B. 555.

Franklyn v.
Webb.
Wells Lent Ass.
1773. MSS.

MALICIOUS PROSECUTION.

variances were objected for the defendant. Mr. Justice *Ashburst* over-ruled the first, the averment being the same in substance, which was sufficient; but he allowed the two last; for by the omission of the words "against the peace," the indictment was bad, and therefore those words were material: and as to the third objection, That a man might be a justice in a county, though not for it, and therefore that was bad: so the plaintiff was nonsuited.

Pope v. Foster.
4 T. Rep. 590.

So where the declaration, after setting out the record of an indictment preferred against the plaintiff, its removal by *certiorari* into *K. B.*, and defendant having there traversed, it went on, and stated, "That the said traverse *afterwards, to wit, on the 25th day of February, at, &c.*, came on to be tried," and then stated the acquittal. At the trial the copy of the record of the indictment produced in evidence, stated the award of the jury process, "if the Chief Justice shall come, *&c. on Tuesday next after the end of the (Easter) term,*" *&c. &c.*, at which time the defendant was acquitted. At the trial it was objected, That the plaintiff could not prove the allegation of his acquittal but by record, and that this record proved it on a day different from that laid in the declaration; and so the variance was fatal. It was answered, That the day laid in the declaration was under a *viz.* and so was immaterial, and that the party might shew the true time. Lord *Kenyon* was of opinion, That he could not admit evidence to contradict the record and nonsuited the plaintiff. On a motion for a new trial, the Court concurred with the judge, that it was a material allegation though laid under a *viz.*, and that the variance was fatal; though they agreed that the declaration might lay the acquittal on the first day of the sittings, and prove it on any other day in the *same sittings*, and it would not be fatal, as the whole sittings were to be considered as one day.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Bull. N. P. 14.

1. "As to support this action there must both appear to be malice and a want of probable cause, though express malice be proved; yet if defendant can prove a probable cause, he shall have a verdict."

Knight v. Jermyn.
Cro. Eliz. 134.

Therefore the defendant's plea should shew what causes and grounds of suspicion he had to prosecute the plaintiff: as if it was for indicting the plaintiff for felony, he *should shew his grounds for suspecting him*, as that he was found on the spot, *&c.*

Johnson et ux. v. Browning.
6 Mod. 216.

* [534]

* So he should shew that a felony was committed, and if there was nobody present at the time of the supposed felony but the defendant and his wife, their oath at the trial of the indictment may be given in evidence to prove the felony.

2. So

2. So in case in the nature of conspiracy, the plea should set out the case as it was, and the circumstances inducing the defendants to prefer their bill or indictment against the plaintiff.

Pain v. Rochester & al.
Cro. Eliz. 874.

And where the defendant so sets out the special matter, he need not traverse the *false & malicious* laid in the declaration, since he states the facts which the plaintiff might have traversed.

Chambets v. Taylor.
Cro. Eliz. 900.

4. OF THE EVIDENCE.

1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. In an action for maliciously holding the plaintiff to bail, the Court held it, 1st, That it was not necessary to prove *that there was any affidavit of debt to hold the defendant to bail*, for that the indorsement on the writ was sufficient. 2dly, That if the declaration had averred that such an affidavit had been made, *an office-copy of it would have been sufficient*; but if it were stated to have been made by defendant himself, perhaps the *original* affidavit itself should be produced and proved.

Croke v. Dowling.
E. 22 G. 3.
Bull. N. P. 14.
last ed.

2. If this action is for maliciously indicting the plaintiff *for a felony*, on which the defendant has been acquitted, *there must be copy of the record and acquittal from the court where the trial was had*, and which must be granted by that court, produced in evidence: but where the indictment is only *for a misdemeanor*, as for keeping a disorderly house, the granting by the Court of such a copy is not necessary. Here the clerk of the sessions attended with the record of the acquittal for the misdemeanor at the sessions, and it was held to be good evidence.

Morrison v. Kelly.
1 Bl. Rep. 385.

As therefore the court where the acquittal was must grant a copy of the record and acquittal, in order that the plaintiff may maintain his action, and it is discretionary in them to grant or withhold it, it is therefore usual to deny a copy of the indictment where there has been any, the least, probable ground to found such a prosecution on.

Carth. 427.
3 Bl. Com. 336.

* But where the plaintiff and another were indicted for forgery at the *Old Bailey*, and acquitted, and a copy of the indictment and acquittal granted to the *other only*; in this action, which was for the malicious prosecution, the plaintiff offered the copy of the indictment so granted in evidence; and the order at the *Old Bailey* was read by way of objection: but the Chief Justice admitted it, saying, 'That an order was not necessary to make it evidence, nor is it ever produced in order to introduce it: so it was read, and the plaintiff obtained a verdict; which the Court refused to set aside.'

Jordan v. Lewis.
1 Stra. 1122.
*[535]

2. The

MALICIOUS PROSECUTION.

Clayton v.
Nelson.
Pasch. 1712.
Middlesex.
Per Parker,
Ch. Just.
Bull. N. P. 13.

2. The plaintiff may give in evidence the substance of that given on the indictment, and the charges of the acquittal, and the circumstances which shew that the prosecution was malicious and without probable cause; and he may likewise give in evidence the circumstances of the defendant in order to increase the damages.

Chambers v.
Robinson.
Stra. 691.

As in this case, in evidence of malice, the plaintiff was allowed to give in evidence, *advertisements put into the papers by the defendant*, mentioning, that the indictment had been found against the plaintiff, and other scandalous matters, though an information had been granted for them as libels.

Johnson & ux.
v. Browning.
Mod. Caf. 212.

3. The defendant's name on the back of the bill is sufficient, and the best evidence of his having been sworn to the bill; so it may be proved that he was a witness without having the bill.

Girdington v.
Pitfield.
1 Vent. 47.

But a person's name being indorfed is no evidence that he was prosecutor: for in this case it was the name of the justice and others, who were to give evidence.

Edward v.
Williams.
Monmouth
Lent Aff. 1764.
MSS.

In an action for a malicious prosecution by indicting the plaintiff at the quarter sessions, the defendant produced the original indictment, which was admitted; but it being objected, That though this was admissible evidence to prove the defendant the prosecutor, by shewing his name on the back of the bill, yet it was no evidence as to the caption, which is a material averment in the declaration, *viz.* that the quarter sessions were held at such a place and time, and before such justices: Justice *Wilmot* was clearly of opinion, That this could not be supported by parol evidence of the minutes of the sessions; but that for this purpose a record should have been made up, and the original, or a copy, produced: so the plaintiff was nonsuited.

Rogers v.
Ilcombe.
Taunton Lent
Aff. 1785. MSS.
* [536]

In an action for maliciously holding the present plaintiff to bail when nothing was due, and in which the defendant * had been nonsuited: to prove the holding to bail, *an office-copy of the affidavit* made by the defendant (then the plaintiff) was offered in evidence. It was objected to, that the *original affidavit itself* ought to be produced: but Justice *Buller* said, This evidence had been held sufficient, in a case from the home circuit, and that he had held the writ as indorfed sufficient evidence: the plaintiff then offered evidence as part of her damages in this action, *the costs she had been put to in defending the former action*; to which it was objected, that these costs having been taxed upon that action, and paid to the present plaintiff, that she could not go for them again in this action. *E contra* it was insisted, That as the extra costs always exceeded the taxed costs, that they might go for these: and the defendant's counsel further objected, That

That the gift of the present action being the arrest, that no costs could be proved as damages, but those occasioned by the mere arrest: and the judge rejected the evidence, apparently on both grounds.

So, to prove the first suit at an end, a judge's order to stay proceedings on payment of costs in that cause, and proof of payment, is not sufficient evidence to prove the first suit determined.

Kirk v. French.
Espin. Caf. N.P.
79.

4. If the plaintiff declares for a malicious indictment of which he was *lawfully acquitted*, if on the trial it appears that he got off by a *noli prosequi*, the evidence will not maintain the declaration; for a *noli prosequi* is only a discharge to the indictment, but no acquittal of the crime. But if the party had pleaded *not guilty*, and the attorney-general had confessed it, that would support the declaration.

Goddard v.
Smith.
Salk. 21.
Mod. Caf. 261.

5. In this case, which was that of the *Cock Lane* ghost, the Court held that there was no need of proving the *actual fact of the defendants meeting and conspiring together*; that that might be collected from collateral circumstances. It was on an *information*: *ideo quare* if there is any difference in the case of an action?

Rex v. Parsons
& al.
2 Bl. Rep. 392.

I. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

Though an action will lie for a malicious prosecution, yet it is not to be favoured: therefore if the *indictment has been found by the grand jury*, the defendant shall not be obliged to shew a probable cause; but it shall lie on the plaintiff to prove express malice. However, if he can, the defendant should give evidence of a probable cause, and for this purpose, proof of the evidence given on the indictment is good. And where the fact lies in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice.

Savill v.
Roberts.
Salk. 15.

Cobb v. Carr.
Middlesex,
Mich. 1746.

Parrot v.
Fishwick.
London, after
Trin. 1772.
Bull. N.P. 14.

*So in an action for malicious prosecution, Lord *Hardwicke* said, That actual and express malice need not be proved; but it was incumbent on the defendant to shew probable cause for the prosecution; for without that, the law will imply malice in the first prosecution.

Veridale v.
Manfall.
Mich. 9 G. 2.
MSS.

*[537]

5. OF THE DAMAGES.

1. The foundation of this action being malice, and the want of a probable cause, the Court refused to grant a new trial for excessive damages, though no injury had happened to the plaintiff's trade or reputation, and the sum expended in his defence was much less than the damages given: for the

Farmer v:
Darling.
4 Burr. 1972.

MALICIOUS PROSECUTION.

the Court held, That the *malice* should enter into the consideration of them.

Lane v.
Santeloe.
1 Stra. 79.

Lewfield v.
Bancroft.
2 Stra. 910.

2. How far the jury may sever in the damages it has been decided ; that where this action was brought against the prosecutor of the indictment, and the justice who had committed the plaintiff, and the jury gave 200 *l.* damages against the prosecutor, and 20 *l.* damages against the justice ; Ch. Just. *King* took the verdict so. But in this case, against several defendants, the jury gave 800 *l.* damages against one, and 100 *l.* each against three others. Lord *Raymond* said it could not be done ; and a verdict was given for 1100 *l.* against them altogether : *ideo quare* ?

CHAPTER XII.

The Action of Trover.

TROVER is an action which lies where one man gets possession of the goods of another by delivery, finding, or otherwise, and refuses to deliver them to the owner, or sells or converts them to his own use, without the consent of the owner; for which the owner by this action recovers the value of his goods.

In this action the defendant is supposed to have come legally into possession of the goods, and the wrong done, or the gist of the action, is the illegal conversion of them to his own use; without which the action cannot be maintained.

I shall in this action consider, 1st, The nature of it, with reference to the things for which it lies: 2dly, With reference to the person: 3dly, The pleadings: 4thly, The evidence: 5thly, The damages and costs.

1. OF TROVER WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

1. IN THIS ACTION THE VALIDITY OF SALES MAY BE TRIED.

These are, 1st, Of sales by the parties themselves: 2dly, Of sales by the intervention of a factor or agent: 3dly, Sales by the sheriff: 4thly, Sales of stolen goods: 5thly, Sales void by stat. 13 *Eliz.*

1st. Of Sales by the Parties themselves.

“If a sale is *bonâ fide*, and the vendor does not deliver the thing sold, as the property is changed by the sale, the vendee may maintain trover.

But if the seller of goods takes notes or bills in payment, without agreeing to run the risk of their being paid, and the notes turn out to be worth nothing, that shall not be considered as a payment. And therefore, where the plaintiff had agreed to buy certain articles of plate from the defendant, and wishing to have his arms engraved on them, the defendant sent for an engraver, who usually worked for him, and he was directed by both parties to engrave them, and to bring them back to the defendant, who was to pay for them, and the plaintiff paid for the plate in certain notes which turned out to be bad: and it was adjudged, That the sale was not so complete, but that defendant might stop the goods as *in transitu*.

Owenfon v.
Morfe.
7 T. Rep. 64.

2. Of

2. Of Sales by the Intervention of a Factor or Agent.

1. "If goods are *not delivered* to a factor or agent, but "he is only *impowered to sell* by the principal, this shall not "preclude the principal himself from selling them."

Aleyn v.
Taylor.
Aleyn, 93.
[539]

For where the defendant, being owner of a great quantity of malt, then being on board a vessel, impowered one *Smith* a broker to sell it; before *Smith* sold it, the defendant himself had sold it, but *Smith* had no notice; afterwards *Smith* sold it to the plaintiff, who brought trover for it against the defendant: it was at first doubtful whether *Smith* the broker would not be liable to the plaintiff, as he could not perform his bargain, though it was without his default, so that his sale ought for that reason to be held valid: but afterwards, *Rolle Chief Just.* held, That the owner's sale should prevail against that of his factor, *who had but a bare authority*, and that the broker's sale should have been conditional, if the owner had not sold before; but he said that neither the broker nor his vendees should be liable to any action for detaining the goods, if they had no notice of the sale by the owner.

2. "Where goods are bought by an agent, and possession delivered, but the principal countermands his order, and "the feller is willing to take them back, this rescinds the "contract, and the feller may maintain trover for them."

Salte v. Field.
5 T. Rep. 213.

For where one *Dewhurst* had an house in *London* and another in *America*, but resided in the latter, and kept an agent in his house in *London*, who bought the goods in question for the plaintiff; the goods were delivered to *Dewhurst's* agent on the 3d and 5th of *May*, and by him sent to the packers for the purpose of being sent to *America*. On the 9th of *April* preceding, *Dewhurst* had written a letter from *America*, saying that he was ruined, and ordering his agent if he had purchased any goods to let the sellers have them again. This letter was received in *London* the 18th of *May*, and shewn the same evening to the plaintiffs, who then agreed to take back their goods. On the 18th and 19th of *May* attachments were laid against these goods at the suit of other creditors, and in the *October* following *Dewhurst* returned to *England* and was made a bankrupt. It was adjudged, that *Dewhurst* having offered to restore the goods and the owner, consenting to take them, that the contract was completely rescinded, and that therefore they could not be taken under any process issued against *Dewhurst* the buyer, whose property was at an end, by the plaintiff consenting to take them again.

Smith v. Field.
5 T. Rep. 402.

But if the feller having the offer to have his goods returned does not accept it, but does any act affirming the sale,

sale, (as here by proceeding by foreign attachment,) in such case he cannot have his goods again.

3. A factor has only power to *sell* the goods of his principal, and thereby bind him: he cannot bind or affect his principal's property, by *pledging* them as a security for his own debt, though there is the formality of a bill of parcels and a receipt.

Paterfon v.
Taff.
2 Stra. 1178.

Therefore where the plaintiff had consigned goods from France to one *Davallon* as his factor in *England* to sell for him on commission, and he pledged them with the defendants. It was held that the plaintiff might recover the value of them in an action of trover against the defendant, having previously tendered to the factor the sum in which he was indebted to him, and that he need make no tender to the defendant the pawnee.

Daubigny v.
Duval.
5 T. Rep. 604.

4. "Wherever a purchase is made by the intervention of a broker or *special agent*, if such broker or agent does not act within his authority, the principal is not bound:" as for example, where he was employed to buy one sort of silk and he bought another, it was ruled, that the principal was not bound by the bargain; but for all acts of a *general agent*, the principal is liable.

East India
Company v.
Hensley.
Espin. Caf. N.P.
111.

2. Of Sales by the Sheriff.

In this case, the sheriff having taken goods in execution, was discharged of his office before a sale or the writ returned; but he afterwards sold the goods without a *venditioni exponas*: upon trover being brought for them, it was resolved, That the *feri facias* gave him an authority to sell without any other writ, though he was out of office.

Ayre v. Aden,
Cro. Jac. 73.
Yelv. 44. S. C.

3. As to the Sales of Stolen Goods.

By stat. 21 H. 8. c. 11. "Goods stolen shall be restored to the owner, upon his giving or procuring evidence against the felon, so that he be prosecuted to conviction."

Wherever therefore the felon is convicted, the owner may maintain trover for the goods stolen, into whose hands soever they have come; and at common law they were not bound, even by a sale in market overt.

2 Inst. 714.
Kel. 47.

But if stolen goods are sold in market overt, *the owner cannot maintain trover for them till after the conviction*, for it depends on that whether he will be entitled or not, as till then he has no property, which is necessary to maintain this action; and if the person who had so bought them in market overt, sells them in the interval before conviction of the felon, he shall not be liable to an action of trover; for he shall not be obliged to keep the goods which may be of a perishable nature: and that shall be so, though *he received notice* from the owner of the goods of their being stolen: but

Horwood v.
Smith.
2 T. Rep. 750.

but *per Lord Kenyon* the plaintiff having a right to restitution of his goods, would perhaps be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them up; for then the goods are converted to the prejudice of the owner.

“ But the owner is only entitled to have his goods where the prosecution was for felony.”

Parker v.
Patrick.
5 T. Rep. 175.

But where the defendant had been *defrauded* of the goods in question by false pretences, by a person who had pawned them to the plaintiff for a valuable consideration without notice of the fraud: this person the defendant had prosecuted for the fraud, and convicted him, and then got his goods again: the pawnbroker brought trover for them: it was insisted for the defendant, that the possession obtained by the plaintiff was similar to the possession of stolen goods, except that the one was through the medium of felony, and the other of fraud: but it was resolved, that the owner was entitled to restitution of his goods in case of felony, by virtue of a positive statute, but that that did not extend to a case of fraud, and that therefore the pawnbroker might well maintain the action.

4. As to Sales void by Statute 13 *Eliz. c. 5.*

By this statute it is enacted, “ That all feoffments, gifts, “ alienations, and conveyances of lands or goods, and all “ and every bond, suit, judgment, and execution made “ to the intent to defraud creditors, shall be null and “ void.”

Waller v.
Burrows.
In case 1745. &
Taylor v. Jones.
Ibid. 1743.
Butler N.P. 257.

1. But it seems settled, That no conveyance shall be deemed fraudulent within the statute, unless it can be proved that the person was indebted at the time of the assignment or conveyance, or very nearly so, so that they may be connected together.

2. The only cases to which the statute extends is where there is no consideration, or where there is no possession, or only a colourable possession delivered, and therefore does not extend to cases of real and *bona fide* creditors.

Holbird v.
Anderson.
5 T. Rep. 236.

As where one *Charter* being indebted to the plaintiff and also to one *Shepherd*, was sued by *Shepherd*, who recovered against him in *Easter* term 1791, on which he brought a writ of error, which was non-prossed in *Easter* term 1793: *Shepherd* was then going to take out execution, when *Charter*, knowing *Shepherd's* intention, went to the plaintiff and informed him of his situation, and gave him a warrant to confess a judgment, which was immediately entered up, and an execution sued out and delivered to the defendants (the sheriffs) two hours before that of *Shepherd*. The defendant levied under *Shepherd's* writ, and returned *nulla bona* to the

the plaintiff, who thereupon brought his action; for the defendant it was contended that this was fraudulent within the stat. 13 *El.* but the Court held, that the defendant might so prefer a *bonâ fide* creditor, and that the case was not within the statute.

The assignment of all his effects to a *bonâ fide* creditor is only void in the case of bankrupts, for a common person may make such an assignment, which shall be good.

Estwick v. Cailland.
5 T. Rep. 420.

3. "Wherever therefore a person makes a bill of sale of his effects, or any other similar conveyance, *unless possession follows and accompanies the deed*, it shall be deemed fraudulent, and the goods may be recovered in trover."

Per Buller, Just.
2 T. Rep. 595.

As where one *Pierce* being indebted to *Twyne* in 400l. and to *C.* in 200l. and *C.* having brought an action of debt against *Pierce*, pending the writ, he made a general deed of gift of all his goods and chattels to *Twyne* in satisfaction of his debt, but notwithstanding, *Pierce* still continued in possession of his goods, some of them he sold, he shored the sheep, and marked them with his own mark, and exerted every act of ownership: this transaction appearing, it was clearly held, That the conveyance to *Twyne* was fraudulent and void within the statute 13 *Eliz.*; for it was made with a trust between the parties, and the owner continuing in possession, it gave him a credit whereby he traded with others, and so was enabled to cheat and defraud them.

Twyne's case.
3 Co. So. b.
Vid. *Paget v. Perchard & alt.*
Esplin. Caf. N.P.
205.

Stone v. Grubham.
2 Bullst. 218.

So where in trover by the sheriff for goods which had been taken by the defendants, after they had been taken in execution by him at the suit of a creditor, in April 1787; the defendants set up an assignment of the goods by *Hayes* (who was the owner) to two persons for the benefit of such of his creditors as would sign a composition-deed by a certain time, which assignment was dated 16 August 1786; the plaintiff replied, that in that assignment it had been agreed that *Hayes* should continue in possession till May 1787, and that he did so continue in possession; upon which the Court were clearly of opinion that the assignment was fraudulent, and void within the statute 13 *Eliz.* though it appeared that during that time *Hayes* was to account with the two trustees for the profits of his business; and the plaintiff recovered accordingly.

Bamford v. Baron, quot.
2 T. Rep. 594.

[541]

So where a person, being indebted both to the plaintiff and the defendant, made a bill of sale of all his effects to the defendant, in which was a clause that the defendant should be at liberty within fourteen days from the execution of the bill of sale, to enter upon and sell the effects so assigned, in case the money was not sooner paid; before the end of the fourteen days, the person died; upon which the defendant entered upon the goods and sold them, when it was held that the owner having been left and dying in possession

Edwards v. Harben.
2 T. Rep. 587.

possession of the goods, that the assignment was fraudulent, and that the defendant, having so interfered, should be liable to the whole of the plaintiff's debt as executor *de son tort*.

Per Buller, Just.
in S. C.

4. " But the cases here are where the conveyance is *absolute*; for cases may occur in which the owner may continue in possession, and yet the conveyance not be fraudulent: as if the conveyance is *conditional*, there the vendor's continuing in possession does not invalidate the sale, *because by the terms of the conveyance* the vendee is not to have possession till he has performed the condition."

Ibid.

" So where the want of immediate possession is consistent with the deed."

Cadogan v.
Kennett.
Cowp. 432.
Vid. *ut* Foley v.
Burnell, quot.
Cowp. 435.
S. P.

As where on the marriage of Lord *Montfort*, the household goods of his house in town were, *inter alia*, conveyed to trustees, in strict settlement: Lady *Montfort's* fortune was 10,000*l.* equal to pay all his debts at the time of his marriage, and the goods were added to the settlement, Lord *Montfort's* real estate not being deemed sufficient to make an adequate settlement; the defendant was a creditor before Lord *Montfort's* marriage, and had taken the goods under an execution: on trover brought for the goods by the trustees, it was held clearly, That the statute 13 *Eliz.* was only intended to operate against *fraudulent* conveyances, and that possession *alone* was not evidence of fraud; that this therefore being a fair and proper settlement, could not be deemed void under the statute, particularly as Lady *Montfort's* fortune was equal to pay all the debts; and the household goods were included in the settlement for a sufficient reason.

Wassington v.
Gill.

2 T. Rep. 597.

[542]

So where personal property, and among other things, some cows were settled on the marriage of the plaintiff's wife on certain trusts, they were held not to be liable to the husband's debts.

Vid. Jarman v.
Wollootton.
Post in this
chapter.

In delivering his opinion in the last case, Lord *Mansfield* said, That courts of law had gone every length to protect personal property in the wife, in cases clear of fraud, that this was done by the intervention of trustees in whose hands all fair settlement of the wife's property before marriage was protected; but where the conveyance is after marriage, that is void against creditors, as being without consideration.

Prec. in Chan.
101. 426.

But where a settlement is made after marriage, *the portion being paid at the same time*, such is good against creditors; so it has been holden, That where the settlement was made after marriage, recited to be in consideration of a portion secured, where in fact such portion has been secured, that that was good against creditors.

5. " An-

5. "Another case of sales not void under the statute though no possession has been delivered, is that of the sale or assignment of *ships at sea*."

For if a ship be sold while at sea, a *delivery of the grand bill of sale* amounts to a delivery of the ship itself, for it is the only delivery of which the subject matter is capable; and besides, it does not give any degree of false credit to the vendee or assignee. *Vid. post plenius.*

Atkinson v. Mallory.
Pasch 28 G. 3.
2 T. Rep. 462.

But an absolute bill of sale of a ship at sea, is void under statute 26 Geo. 3 c. 60. unless there has been a registry of the ship, and the certificate of the registry be recited in the bill of sale, even though the vendee had given an undertaking to restore the ship on a certain day, on payment of the sum advanced on her credit.

Rolleston v. Hibbert.
3 T. Rep. 406.

6. "No person can take advantage of this statute, but the creditors themselves."

Therefore where A. having made a fraudulent conveyance of his goods to B. and then died, B. brought an action against A's administrator for the goods; it was held, That the administrator could neither plead the statute nor maintain the possession of the goods, even to satisfy the creditors; but the Court held, That they might charge the vendee as executor *de son tort*.

Hawes v. Leader.
Cro. Jac. 270.

2. INSTRUMENTS CONVEYING A CHOSE IN ACTION, MAY BE RECOVERED BY TROVER.

As where this action was brought for *letters patent of wine licence*; after a verdict for the plaintiff, it was moved in arrest of judgment, that a record cannot be converted: *sed non allocatur*; for the words *letters patent* here signify the exemplification of them under the broad seal, and so is intended in *common parlance*; for which this action lies.

Jones v. Wickworth.
Hard. 111.

[543]

This has been held in many modern cases.

So trover was in this case held to lie for a bill of exchange.

So for *million lottery tickets*.

So for a *bond*.

So for the *title-deeds* of an estate.

Cowen v. Abrahams.
Esplin. Caf. N.P. 50.
Lucas v. Hayes.
Salk. 130.
Ford v. Hopkins.
Salk. 283.
Arnold v. Jefferson.
Salk. 654.
Yea, Bart. v. Field.
2 T. Rep. 708.

3. TROVER WILL NOT LIE FOR GOODS WHICH HAVE BEEN CONDEMNED BY A COURT HAVING COMPETENT JURISDICTION.

As where the plaintiff brought an action of trover for a ship, tackle, and furniture, which ship had been condemned by the admiralty of France as prize, and bought by the plaintiff when sold under the sentence, but had been taken out of his possession

Hughes v. Cornelius.
Sir T. Raym. 473.

possession by the defendants claiming property on the ground of the capture being illegal: it was resolved, That the courts here were bound to give credit to the sentence of foreign courts, and that their condemnations were not examinable at common law; and therefore the plaintiff had judgment.

“ But where the jurisdiction of the court is in any respect limited, there trover will lie for goods which have been seized or condemned by such courts, for the purpose of trying if such courts have exceeded their jurisdiction.”

Papillon v.
Buckner.
Hard. 478.
Terry v.
Huntington.
Hard. 480. S. P.

As in the case of condemnations by the commissioners of excise, who though under the statutes of excise, they are invested with the right of condemning exciseable goods, &c. yet may the owner nevertheless maintain an action of trover for them, if he supposes them illegally condemned.

4. Another case in which trover lies, is to try the property arising under

CONSIGNMENTS OF MERCHANDIZE.

This is, 1st, To a creditor: 2d, To a factor: 3d, To any other person.

And 1st, Of Consignments to a Creditor.

Hibbert v.
Carter.
Pasch. 1 T. Rep.
745.

* [544]

Caldwell v.
Ball. Pasch.
1 T. Rep. 205.

1. The indorsement of the bill of lading to a creditor, conveys an absolute property to the indorsee; and he * may maintain trover for the goods included in such bills of lading.

And where there are several bills of lading, of different imports, which are differently indorsed, the person who first gets one of them by legal title from the owner or shipper, has a right to the consignment in exclusion of the others.

2. Of Consignments to a Factor.

Per Lord Mansfield, in Wright v. Campbell.
4 Burr. 2046.

If there is an authority ever so general by indorsement of the bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor) retains a lien till the delivery of the goods, and until they are actually sold, and turned into money.

Ibid.

But if the goods are *bonâ fide* sold by the factor while at sea, such sale shall be good, and shall bind the owner, because the goods were *bonâ fide* sold, and by the owner's own authority.

S. C.

And if a factor to whom a bill of lading is indorsed generally, but in fact to him as factor, though that is not expressed, indorses it over as his own property; such indorsement shall be good, if for a fair and valuable consideration

ation and without notice; *aliter* if only a spurious one to defraud the owner.

3. Of Consignments to other Persons.

1. After goods have been consigned, the consignor, if he thinks fit, *may stop the goods before they come to the hands of the consignee*, as if the consignee becomes insolvent or a bankrupt. (*Snee v. Prescott*, 1 Atk. 245.)

Lickbarrow v. Mason.
Mich. 28 G. 3.
2 T. Rep. 63.

“ But this power of stopping the goods is only while they are *in transitu*; for if they come into the possession of the consignee, then the property is changed, and the consignor cannot stop them.”

As where in trover for a quantity of files, the case was, That *Moore* the bankrupt had ordered the goods in question, on the 31st of *October*, from the plaintiffs, who were manufacturers at *Sheffield*: on the 14th of *November* they were sent by the waggon, and arrived in *London* on the twenty-second; the plaintiffs drew a bill on *Moore* for the amount, but it was never paid: on the 15th of *November* a docquet was struck, and on the 18th the commission issued, and the defendants chosen assignees: on the 24th a provisional assignment was made to the messenger under the commission, who on the same day demanded the goods of the defendants, and put his mark upon the cask, but did not take them away: on the 28th of *November* the plaintiffs wrote to the agent of the waggon to stop the goods, in case they had not been delivered; and brought their action against the carrier and the assignees of the bankrupt, who had got possession of them: the Court were of opinion, That *sufficient possession had been taken by the assignees under the commission*, which it therefore was not in the power of the consignor to divest or countermand; and therefore gave judgment for the defendants.

Ellis v. Hunt,
& alt.
3 T. Rep. 464.

[545]

In this case, which was an action of trover for a cargo of fruit, it appeared that the plaintiff, who was a merchant residing at *Leghorn*, had, on the 26th of *September* 1792, received an order from *Dutton and Co.* of *Liverpool* to charter a ship with a cargo of fruit on their account, which he accordingly did. In the month of *March* 1793, which was before the arrival of the ship at *Liverpool*, *Dutton and Co.* were declared bankrupts. The plaintiff having heard of the circumstance of their stopping payment, sent one of the bills of lading to his agents, *Staples and Co.* of *London*, who authorised a Mr. *Ellames* of *Liverpool*, as agent to the plaintiff, to stop the cargo before it was delivered to *Dutton and Co.* On the 9th of *June* following the ship entered the port of *Liverpool*, but was the same evening ordered back to a place called *Hoylelake* to perform quarantine. On the day the ship first entered *Liverpool* (9th of *June*) *Spencer*, one of the defendants went on board

Holt v. Pownal
& alt.
Espin. Caf. N.P.
240.

and claimed the ship as assignee of *Dutton* and Co.'s estate, opened some chests of fruit, and put two persons on board, who staid there till the 18th *June*, when the quarantine ended. On the 17th of *June*, while the ship was performing quarantine, *Ellames*, as agent for the plaintiff, served a notice of *Dutton* and Co.'s bankruptcy on the captain, and claimed the goods on behalf of plaintiff, at the same time offering him an indemnity. Similar notice was served on the defendants. On the 18th *June* the vessel came into harbour, and on the 19th broke bulk, when *Ellames* again made a claim; but the captain delivered the cargo to defendants; to recover which was the object of the present action. Lord *Kenyon* was of opinion, (which was afterwards concurred in by the court of *K. B.*) that there was a sufficient stopping *in transitu*; that in the present action the voyage was not completed till she had performed quarantine, till which time she was *in transitu*, and as the plaintiff's agent had given notice and claimed the goods before the completion of the voyage, he was of opinion that the plaintiff had stopped the goods time enough to prevent the property vesting in the assignees.

Salomons v.
Nissen.
2 T. Rep. 674.

But if the consignee to whom the bill of lading is indorsed, does *not part with his whole interest* in the goods, but only assigns it to another as a collateral security to him, and so *remains interested, or as a partner* in the goods, notwithstanding the assignment; there the property of the consignor is not divested, but he may stop the goods before they reach the hands of the consignee or of the person to whom he indorsed the bill of lading.

5. Another case in which this action is usual, is to try the validity of

COMMISSIONERS OF BANKRUPT, OR TO RECOVER GOODS BELONGING TO THE BANKRUPT ESTATE.

In all actions in which the bankruptcy comes in question, it is necessary to go through all the steps before entered into by the commissioners; that is, to prove, 1st, That the party was a trader: 2dly, The act of bankruptcy: 3dly, The petitioning creditor's debt: 4th, The issuing of the commission: 5th, The assignment: 6th, A property in the bankrupt.—I shall therefore consider each of these in their order.

1. The Party must be a Trader.

Who are to be deemed *traders* within the bankrupt laws depends either on express statutes, or on the decision of the courts on the meaning of that term (trader) as consistent with the spirit of the statutes.

1. The

1. The general description of persons subject to the bankrupt laws, is under statute 13 *Eliz. c. 7. viz.* "Persons using the trade of merchandize by buying or selling by way of bargaining, exchange, re-change, barter, or chevifance by gros or retail, or who seek their living by buying or selling."

2. By statute 21 *Jac. 1. c. 19.* "Persons using the trade of a *scrivener*, receiving other men's money into their trust or custody, may be bankrupts."

[546]

3. By stat. 5 *G. 2. c. 30.* "Bankers, brokers, and factors, are declared to be liable to the bankrupt laws."

4. "Persons having stock in several public companies, are by several statutes declared not to be objects of the bankrupt laws: as having *East India* stock (by statute 14 *Car. 2. c. 24.*) *Bank* stock; shares in the *Engliff* linen company; royal fishing company; *Guinea* company; *London Assurance* company; *South-Sea* company; *Plate-glass* company; or being concerned in the circulation of *Exchequer* bills; by the several statutes of 7 & 8 *W. 3. c. 31.* 8 & 9 *W. 3. c. 2. sect. 47.* 5 *Ann. c. 13.* 7 *Ann. c. 7.* 3 *G. 1. c. 8.* & 4 *G. 3. c. 37. f. 14.*"

Neither shall buying or selling stock, or other government securities; for they are not goods, wares, and merchandize.

Colt v. Netter.
vill
2 *P. Wms.* 393.

5. By stat. 5 *G. 2. c. 30. f. 40.* "No farmer, grazier, drover, or receiver-general of the land-tax, shall be liable to be made a bankrupt."

Under these statutes it has been held,

1. The general words of the statute 13 *Eliz.* being, "*who seek their living by buying or selling,*" a man who lives by buying only, or by selling only cannot be a bankrupt: and so for the same reason it being for the purpose of *seeking a living*, one single act of buying and selling will not make a man a bankrupt, for it must be a repeated practice, and profit sought by it: and on the same principle, no handicraft occupation (where nothing is bought or sold, and so an extensive credit for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as a gardener, gold-beater, &c. who are paid merely for their work and labour.

Per Lord Mansfield.
Cowp. 750.
Com Dig. 522.
2 *Black. Comm.*
476.

Ibid.

Crump v. Farne.
Cro. Car. 31.

So where a schoolmaster bought books and shoes which he sold to his scholars at an advanced price, it was ruled that he was not a trader within the meaning of the bankrupt laws.

Valentine v. Vaughan.
Peake N.P. Cas.
76.

But where persons buy goods and make them up into saleable commodities, though part of the gain is by bodily labour, and not by buying or selling, yet these are within

2 *Black. Comm.*
476.
Luton v. Bigg.
Skinm. 292.

the statutes of bankrupts, for the labour is only in melioration of the commodity, and rendering it more fit for use; therefore, according to the doctrine before delivered, a mere *working taylor* cannot be a bankrupt; but a merchant-taylor, who buys cloth, and makes it up for his customers, may be a bankrupt; and so of other trades, as bakers, brewers, clothiers, &c.

3 Mod. 330.
Dally v. Smith.
4 Burr. 2048.

* [547]

* So the court of B. R. held, That a *butcher* might be a bankrupt."

2. "Neither is it necessary that *the trade be lawful*, in order to make the trader a bankrupt."

Ex parte Mey-
mot.
1 Atk. 196.

As where a commission of bankrupt issued against a *clergyman*, and he petitioned to have the commission super-
feded, on the ground that, by statute 21 H. 8. c. 13. "All
" spiritual and ecclesiastical persons are forbidden to follow
" any trade, or buy or sell for gain, under a penalty:" but
Lord Hardwicke was of opinion, That this penalty only at-
tached against himself, and that he was liable to the bank-
rupt laws, the trading being proved.

Ibid.

So in the same case he held, That a person who dealt
merely in *smuggling and running of goods*, though this was an
offence, and contrary to an act of parliament; yet still that
it was a trading within the statutes; for that in both cases a
person should not take advantage of the breach of one law
to excuse him from the breach of another.

Highmore v.
Molloy.
1 Atk. 206.

3. The statute 5 Geo. 2. having declared that *brokers* might
be bankrupts, Lord Hardwicke was of opinion, That *pawn-
brokers* were included, and might be bankrupts; for though
they are not expressly named, yet the word *broker* is the
genus, and all other kinds of brokerage the species.

4. "Though the statutes mention persons only *using*
" *trade*, &c. as objects of the bankrupt laws, yet if *persons*
" *in other professions or employments*, however seemingly in-
" consistent, will do any acts of trading with a *view to profit*
" they shall be subject to the bankrupt laws."

1 Stra. 514.

As a *gentleman of the bar* who had a colliery, and dealt in
coals in *Durham*, was held to be a trader within the bank-
rupt laws.

Per Lord Hard-
wicke.
1 Atk. 206.

So though a man be a *public officer*, as an *exciseman* or such
like, yet if he will trade, he makes himself subject to the
statutes of bankrupts.

1 Atk. 101.

So a commission of bankrupt formerly issued against a *peer*,
an earl of *Suffolk*, for trading in wines.

5. "Drawing and re-drawing bills of exchange, is an act
" of trading that will subject the party to a commission of
" bankrupt: but such should not be on a *person's own and sole*
" *account*, but *with the money of others* to make a profit."

For

For in this case, which was an issue out of chancery, to try if one *Wilson* was a trader within the bankrupt laws, it appeared that he was an army-agent, and that he was for many years in the habit of drawing bills of exchange on a Captain *Johnson* of *Dublin*, who was likewise an army-agent, to a large amount, and *Johnson* to re-draw upon him. But it appeared further, that *he also received money from officers, their widows, and others*, which he kept for them, and for which they drew on him; but that when he had a large sum he did not keep it in the house, but paid it into *Drummond's* bank, on which he gave checks for any large payments he had to make: in this case the jury found him to be a trader, and the judgment was given accordingly, on the ground of the profit he derived from the exchange, and the use of the money of others.

Richardson v. Bradshaw.
1 Atk. 128.
quot. Cowp. 750.

But where a person, engaged in expensive works, drew bills on different persons, for the purpose of raising money for those works, but allowed to the persons who accepted his bills a quarter *per cent.* commission, besides interest at 5*l.* *per cent.* and also borrowed accommodation-notes in exchange for his own, he was held not to be within the bankrupt laws; for all the transactions of the bills was on *his own account*, and for *his own benefit only*.

Hankey v. Jones.
Cowp. 745.

6. "The words of the statute of bankrupt being, *Using the trade of a merchant by buying and selling*," the act "of buying and selling must be *in the way of a merchant*."

Therefore an innkeeper as such cannot be a bankrupt, for his living is not principally got by buying and selling, but by the use of his rooms and furniture; and he buys meat and drink, not for sale or trading, but for accommodation: neither does he buy or sell at large as a merchant, but to guests only: "For wherever a man buys or sells under a particular restraint or limitation, he is not a seller within the statute, for the statute is selling in the way of merchants; that is, *indiscriminately and generally to all*."

Crisp v. Pratt.
Cro. Car. 549.
Newton v. Trigg.
Salk. 110.

Per Holt.
Salk. 110.

On the same ground that an innkeeper has been held not to be an object of the bankrupt laws, a victualler who sells liquor only in his own house, or out of it in small quantities, as by the pot or mug, is not a trader within the bankrupt laws.

Saunderson v. Rowles.
4 Burr. 2065.

"But in this case, it must be taken that the selling out of the house was rather to oblige customers than as a means of living; for though a person follows the trade of a victualler, yet if he also deals in liquors which he sells indiscriminately, whatever the quantity, he may be a bankrupt."

For where a person kept a public-house or inn, and during the time he was in business, which was about nine months, sold about six gallons of spirits altogether; but it appeared

Patman v. Vaughan.
1 T. Rep. 572.

appeared that *any person* applying for liquors might have been supplied: Judge *Buller* left it to the jury to decide, Whether this was not a trading? and they found the party a bankrupt. And in this case the same justice ruled, That the *quantity sold* was immaterial to the question; for if he had dealt largely he would not probably be a bankrupt.

“ But, however, it may perhaps be proper to take into consideration *the proportion* which the business of selling liquors out of doors bears to the business as an innkeeper or victualler, that so it may appear to be done with a view to seeking a living.”

Buscall v. Hogg.
3 Will. 146.

For where where in this case the person was an innkeeper, but was proved to have sold often large quantities of wine, rum, and brandy to different persons which many after re-tailed again, the judge nonsuited the plaintiffs who were the assignees, holding such person not to be an object of the bankrupt laws; but the Court set aside the nonsuit, holding the doctrine now laid down, that at the trial the proportion of his dealings out of doors as an innkeeper, should have been taken into consideration, and left to the jury.

7. “ The stat. 5 Geo. 2. having declared farmers, graziers, and drovers to be not objects of the bankrupt laws; on this part of the statute it has been decided,”

Milles v. Hughes. Mich.
19 G. 2. C. B.
Bull. N.P. 39.

1. If a person buys cattle at a fair, keeps them three or four days on his land, and then drives them to another fair to sell them, he is a *drover* within the statute.

2. “ But though a farmer, merely as such, is not an object of the bankrupt laws, yet if he buys any great quantities of things, such as are the produce of his farm, and sells them, he shall be liable to a commission of bankrupt.”

Mayo v. Archer.
1 Stra. 513.

As where a special verdict found that one *Richard Baxter* had occupied a farm of 300*l.* a year, and annually planted it with many acres of potatoes, which he sold for gain, and likewise bought from others large quantities of potatoes, which he kept in warehouses, and sold again at different markets. His dealing so extensively and in such manner, was held to make him a trader within the meaning of the bankrupt laws.

Bartholemew v. Sherwood.
Mich. 27 G. 3.
quor.
1 T. Rep. 573.

So where the plaintiff was assignee of one *Davis*, who, it appeared, rented a considerable farm at *Whitchurch*, and kept two or three teams of horses, that previous to his taking the farm he had lived with an uncle, during which time he attended fairs, and bought and sold several horses; and after he took the farm, he occasionally attended fairs, and bought horses which were not calculated for the farming business, and which he always sold again for some profit. On this evidence the Judge left it to the jury to decide,

cide, Whether the dealing in horses was not distinct from the farming business, and done with a view to profit? and the jury found *Davis* a bankrupt; which verdict on a motion for a new trial was afterwards confirmed by the court.

“ In these cases, the person carried on a business independent of the merely using the land; for where the whole trading arises from the land itself or its profits, the person cannot be a bankrupt.”

As where the person against whom the commission was sued out, was proved to have *purchased a coal-mine, worked it, and sold the coals*, he was held not to be a trader within the statutes of bankrupt. Port v. Turton.
2 Will. 169.

So where a person purchased *allum-works*, the same decision took place. Newton v.
Newton,
quot,
2 Will. 170.
1 T. Rep. 34.

“ For where a person exercises a manufacture from the produce of his own land, *as a necessary and usual mode of enjoying the produce of that land*, he shall not be considered as a trader within the bankrupt laws, though he buys the necessary ingredients to fit it for market. But where the produce of the land is merely the *raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land*, there he is a trader within the bankrupt laws.”

Therefore where a person rented a piece of ground *merely and solely for the purpose of making bricks for sale*, the Court of King's Bench held that he might be a bankrupt; but this case afterwards went off on another point in the House of Lords. Wells v. Parker.
1 T. Rep. 34.

So where it was proved, That the person declared a bankrupt was a farmer, and rented 100l. *per ann.* and made bricks of earth, taken off the waste without any licence from the lord (but for which he afterwards paid a consideration) that he used a kiln not built by himself, and had at various times made from 40 to 70,000 bricks every year, and sold different quantities, sometimes to particular persons only, and sometimes generally to all who came: it was held, That this being not to improve his own estate, nor in the usual mode of enjoying it, but a purchasing of the materials for carrying on a trade, that therefore he was an object of the bankrupt law. Ex parte Harrison. Brown
Ch. Caf. 173.

* “ 8. A person may be a bankrupt who has traded with this country, *though he has resided entirely abroad*, and whether he be a native or a foreigner. Dodworth v.
Anderson.
1 L. Raym. 375.
* [551]

As where it appeared that one *John Ashley* went from *England* in 1720, and *resided in Barbadoes till 1735*, where he was a factor, and planted and traded to England, sending the produce Ex parte Smith.
Cowp. 402.

duce of his plantations to *England*, and receiving back goods on his own account, or as factor for others: he came to *England* in 1737, and then committed an act of bankruptcy: it was adjudged that a commission could well issue, though the trading was abroad.

Alexander v.
Vaughan.
Cowp. 398.

So in this case, where the person against whom the commission issued, was a native of *Scotland*, resided there, and kept an house at *Edinburgh*: he traded with *England*, and very extensively to all parts of the world: he came to *England*, where he was arrested; and having lain two months in prison was declared a bankrupt: he brought an action of trespass, in which all the authorities were considered; and the Court were clearly of opinion that the commission had regularly issued.

Bird v.
Sedgewick.
Salk. 110.

So where a gentleman of the *Temple* went to *Lisbon*, where he turned factor, and traded with this country, he was held to be liable to the bankrupt laws, by reason of his trading and gaining a credit here.

Ex parte Car-
rington.
3 Atk. 206.

9. The daughter of a freeman of *London*, who trades separately from her husband, or any feme-covert trading separately from her husband in *London*, may by the custom become a bankrupt.

And so it should seem that a feme-covert, having a separate maintenance and living apart from her husband, may be made a bankrupt, for she is in such case liable for her own debts. (*Ante* 126.)

Case of Ann
Fitzgerald.
Green's Bank.
Law. 8.

So where the husband and wife separated, and divided the property they possessed, and her part was assigned to trustees for her separate use, not subject to the interference or controul of the husband, and afterwards she traded; Lord Ch. Bathurst directed her to be found a bankrupt, notwithstanding her coverture.

“ But where a feme-sole trades and commits an act of “ bankruptcy, and afterwards marries, she cannot be made a “ bankrupt.”

Ex parte
Mear. Cooke
B. L. 44.

[552]

Therefore where *Frances Mear* had before her marriage kept an inn in *Birmingham*, by the name of *Frances Piper*, but had declined business in *December* 1784, and in *February* 1785 had intermarried with *Henry Mear*: the act of bankruptcy proved was in *October* 1784, and the commission sued out in *December* 1785; on petition the commission was ordered to be superseded, on the ground of its having issued against a married woman.

2. Of the Act of Bankruptcy.

What are acts of bankruptcy are declared by several statutes.

1. By

1. By stat. 13 *Eliz. c. 7.* 1 *Jac. 1. c. 15.* "Departing from the realm with a view to delay or defraud creditors, is an act of bankruptcy."

"But in this case it must appear that the departure was for the purpose of delaying or defrauding creditors; but if it appears that in fact they are delayed by such departure, it will be the same as if the first departure was fraudulent."

Ex parte Gulton.
1 Atk. 193.

For where it appeared that the bankrupt had fled and gone abroad for killing his wife, Ch. Just. Reeves held, That shewing *quo animo* it was done, might prevent such departure from being construed an act of bankruptcy; but it appearing in fact that by such departure the creditors were delayed and defrauded, he then held it an act of bankruptcy, though this case might also fall under the second description of acts of bankruptcy, viz.

Cited in Degolls v. Ward.
Hil. 12 G. 2.
Bull. N. P. 39.

Raikes v. Porcau.
Sitt. Trin.
26 G. 3.
Cook B. L. 95.
S. P.

2. By stat. 34 & 35 *H. 8. c. 4.* it is enacted, "That withdrawing out of the king's dominions into foreign parts, with intent there to remain and so defraud creditors, and not returning within three months after proclamation, is an act of bankruptcy."

So that under this statute a person departing the realm with the consent of his creditors may be a bankrupt, by remaining abroad, though under the former he could not.

3. A third act of bankruptcy is by stat. 13 *Eliz. c. 7.* and 1 *Jac. 1. c. 15.* which enacts that, "Beginning to keep house, so that he cannot be seen or spoken to by his creditors, is an act of bankruptcy."

Under this statute it has been held,

1. "That a trader ordering his clerk or servant to deny him to a creditor, is not an act of bankruptcy, for there must be an actual denial."

For where a trader gave orders to his servant to deny him to his creditor on the 26th of May, but he was not actually denied till the 28th to a creditor, it was adjudged, That the actual denying not the order to deny, constituted the act of bankruptcy; so that he was only a bankrupt from the 28th.

Hawkes v. Saunders.
Trin. 24 G. 3.
Cooke B. L. 96.
*[553]

2. But being denied when at home, though not itself an act of bankruptcy, yet is evidence of it; but in such case it must appear that the denial was with intent to delay creditors: for if the party be ill in bed when denied, or the creditor calls at an unreasonable hour of the night, or he is in company, such will be no act of bankruptcy.

Bull. N. P. 39.
Per Lord Hardwicke.
1 Atk. 201.

"And it seems that by the construction put upon this statute by the courts, that an actual denial to a person calling

" calling for a debt is necessary, and required as essential
" to support the act of bankruptcy last mentioned."

Garrett v.
Maulc.
5 T. Rep. 575.

For where it appeared in evidence, that the bankrupt, on the 4th of *June* 1793, being in insolvent circumstances, and in expectation of having several bills that were due being presented to him for payment, retired up stairs in his house, and gave orders to his clerk to deny him; he was denied to several persons, but it did not appear that they were creditors. On the 7th of *June* one *Ryder*, a creditor of his, called at the bankrupt's house about other matters; but understanding that he was from home, did not ask for him. He continued in the house half an hour in conversation with the clerk, with the knowledge of the bankrupt, and asked if his wife could not give him part of his debt, but was denied. This was held not to be an act of bankruptcy, as there was no actual denial to a creditor.

Field v. Bellamy.
Hil. 15 G. 2.
Bull. N. P. 39.

3. And on the same ground where the person was denied by agreement, in order to ground a commission on it, Ch. Just. *Lee* held it not to be an act of bankruptcy.

Bromley v.
Mundee.
G. Hall, 2d
June 1756.
Bull. N. P. 39.

Though here, where the case was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before, at which he and the plaintiff were both present) was denied to the plaintiff's clerk who came to demand money, *Justice Foster* held this to be a sufficient act of bankruptcy. But Judge *Buller* in his *Nisi Prius*, puts this with a *quere*. Perhaps the distinction may be, that the parties who have so concerted the act of bankruptcy cannot afterwards say, that the commission was fraudulently taken out: but such act would be sufficient for persons not privy to it.

Cowley v.
Hopkins.
Sitt. Mich. 1785.
Cooke B. L. 105.
Stewart, Aff.
v. Richman.
Esp. N. P. Caf.
108. S. P.
Roberts v.
Teafdale.
Peake. N. P. Caf.
27.

And it was ruled in this case by Mr. Just *Buller*, at *Guildhall*, according to that distinction: the action was *trover*, for goods taken in execution; and the question was on the time of committing the act of bankruptcy: he ruled, That if a man leagues with some of his creditors, and keeps house with intent to commit an act of bankruptcy, and is accordingly denied to one of such creditors, it is a fraudulent act of bankruptcy, and will not support the commission: but if the creditor calling be not a party to, nor acquainted with such agreement, it shall not operate to his disadvantage; and the denial will be good evidence of an act of bankruptcy.

1 Burr. 484.

And where *being denied* is the act of bankruptcy relied on, circumstances may be shewn that he *did not do it to avoid payment*, but on account of sickness or particular business.

4. "So the denial must be to a creditor."

Jackman v.
Nightingale.
Pasch. 13 G. 2.
Bull. N. P. 40.

For though a man, with intent to delay his creditors, orders himself to be denied, yet unless he in fact be denied to a creditor

creditor it is no act of bankruptcy; therefore it is necessary to prove that the person denied was a creditor.

*And in this case it was held, That being denied to a person who came on behalf of a creditor was not sufficient, though it was given in evidence that the bankrupt was afterwards denied to many creditors, and so continued to be till the commission was sued out.

Barrow v. Forster. Per Lord Camden, Norwich Sum. Aff. 1765. Green's Bankrupt Law, 45.

* [554]

But a clerk calling with a bill of the house to which he belongs, is a sufficient creditor within the meaning of these cases, as I have often seen in practice.

Where the act of bankruptcy is a denial to a creditor, a witness proving that several persons called and inquired for the bankrupt, whom the witness believed to be creditors, but could not say in fact whether they were so or not, was ruled by Lord *Kenyon* to be evidence to go to the jury, whether, in fact, the persons calling were creditors, or not.

Jamefon v. Eamer. Espin. N. P. Caf. 381.

5. And so it must appear that a *debt is actually due*; as if a creditor by *note payable at a future day* calls, being denied to him, is not an act of bankruptcy, as he is not *then* a creditor.

Per Ld. Talbot, 7 Vin. Abridg. 62.

6. But a *banker's* stopping or refusing payment is not an act of bankruptcy, for it is not within the description of any of the acts of bankruptcy, and there may be good reason for doing so; as suspicion of forgery or the like. And if in consequence of that refusal he is arrested and puts in bail, it is no act of bankruptcy.

Mosely, 3. 7 Vin. Abridg. 6. pl. 12. in marg.

4. "Departing from his dwelling-house, or otherwise absenting himself, is another act of bankruptcy by stat. 13 *Eliz. c. 7.* and 1 *Jac. I. c. 15.*"

1. As where it appeared that the bankrupt had gone out of town on the morning of the 28th of *November* and returned in the evening, before which time a bailiff had been at his shop to arrest him, and the next morning he sent for the bailiff and told him, that he had gone out of town that day in order to get the term of the plaintiff; and now that the return of the writ was out, if he would take out a new writ, that he would give bail; which was done accordingly. This was held to be clearly an act of bankruptcy, being a departing from the house with intent to *delay and defraud a creditor.*

Maylin v. Eyloc. 2 Stra. 809.

2. "But the absenting himself must be to avoid the *payment of a debt.*"

For if a man absents himself for fear of being arrested by an *attachment out of chancery* for non-payment of money decreed, that will make a man a bankrupt.

Com. Dig. 523.

Com. Dig. 523.

But if a man absents himself for fear of being arrested by a *capias de excommunicato capiendo*, that will not make him bankrupt.

Lingood v. Eade.
1 Atk. 196.

[555]

So in this case Lord Ch. Just. *Willes* was of opinion, That a person's absconding to avoid an attachment for non-performance of an award, in not delivering goods in pursuance of the award, was not an act of bankruptcy, for it was not within the words of the stat. 1 Jac. 1. c. 15. which makes it an act of bankruptcy in a person to keep out of the way, or depart from his dwelling to avoid the payment of a just and true debt, but the delivery of goods was rather a duty; and Lord *Hardwicke* afterwards recognized this distinction between a debt, and a duty, as the true one.

Phillips v.
Sheriff of Essex.
Green B. L. 53.

3. So the absenting himself must be *voluntary*; which if done but for a single day, for the purpose of delaying his creditors, it is an act of bankruptcy; but if the *departing was involuntary*, as under an arrest, such is not an act of bankruptcy.

5. "Another act of bankruptcy is, being arrested for debt and lying in prison two months on that or any other arrest or detention for debt, which makes him a bankrupt from the time of the first arrest: or willingly and fraudulently procuring himself to be arrested." By stat. 1 Jac. 1. c. 15. and 21 Jac. 1. c. 19.

Under this part of the statute it has been held,

3 Lev. 58.

1. The *arrest must be lawful*, therefore an arrest by an executor before probate, is not an act of bankruptcy.

Came v.
Colman.
Salk. 109.
Tribe v.
Webber.
Hil. 17 G. 2.
C. B. Bull. N. P.
38. S. P.
Rose v. Green.
1 Burr. 437.
Bull. N. P. 39.
S. C.

2. That though the words of the statute are, that he shall be a bankrupt *from the time of the first arrest*, yet that if a trader is arrested and puts in good bail, but afterwards surrenders himself in discharge of his bail, he shall only be a bankrupt *from the time of his surrender*.

But where *sham-bail* is put in before a judge as a means to get defendant turned over to the prison of the court, and he is *eo instante* surrendered by his bail, this shall be considered a mere evasion and a continuation of the first arrest; and the bankruptcy shall relate to the first arrest.

Hope v. Gill.
Beawes, 489.
Cit. Cook B. L.
121.

3. It has been decided in one case, that lying in prison two lunar months will make the party a bankrupt from the time of the first arrest: and though the commission was taken out before the two months expired, yet he appearing to be a bankrupt by relation to a time before the suing it out, it was held sufficient.

1 Burr. 439.
Com. Dig. 523.

2. To make the *procuring one's self fraudulently and willingly to be arrested* an act of bankruptcy, it must be on a feigned action or a *sham-debt*.

6. Another act of bankruptcy is "After having been arrested, *escaping* where the debt is 100*l.* or suffering himself to be outlawed." By stat. 21 *Jac.* 1. c. 19.

1. But an escape to become an act of bankruptcy under this clause in the statute, must be *against the consent of the sheriff or officer*; such an escape as is criminal, which shews the party intended to run away and defraud his creditors; not a constructive one, as being out of the sheriff's bailiwick, in passing through a different county in the custody of the sheriff.

1 *Ld. Mansfield.*
1 *Burr.* 440.

[556]

As where the person was arrested in *Kent*, and was brought up by *habeas corpus*, in order to be turned over, and on the road to the judge's chambers, was permitted, at his own desire, to call at his attorney's house in *London*, which was out of the county of *Kent*; he was from thence carried to a judge's chamber and there bailed, and then surrendered: it was held, That this was no *escape* within the meaning of the statute.

Rose v. Green.
1 *Burr.* 437.

2. But under these several clauses of the different statutes with regard to acts of bankruptcy created by arrests, it is to be observed, that a person's giving money for notice when a writ comes into the sheriff's office against him, is no proof of an act of bankruptcy: for he may do it to prevent his credit from being blown.

Croxtan v. Hodges, per *Fortescue* at *Hereford.*
4 *G.* 2.
Bull. N. P. 40.

7. By stat. 1 *Jac.* c. 15. "Willingly or fraudulently procuring his goods or chattels to be sequestered or attached, is another act of bankruptcy."

The word *attachment* being coupled with sequestration and arrest, means that sort of attachment and sequestration which it is the custom of *London* and other cities to use.

Per *Ld. Mansfield.*
Cowp. 428.

But this attachment or sequestration must be by his own procurement; for it is no act of bankruptcy if done without his knowledge.

Com. Dig. 523.

Therefore in an issue out of Chancery, to try the time of a bankruptcy, the case was, *Gray* the bankrupt had borrowed money of *Spotswood*, the defendant, upon a bond and warrant of attorney; *Spotswood* entered up judgment and sued out execution, which was executed the 5th of *April*: the transaction was however kept secret, and the officer in possession appeared to be an indigent relation of *Gray's*, who carried on his business as a coachmaker till the 25th of *May*, when he was arrested, and then an inventory was made out and the goods sold, the money remaining in the sheriff's hands: during the time the bankrupt remained in possession he contracted large debts and paid to the defendant on divers accounts 1390*l.* which was more than double the debt on the judgment, that being only 500*l.*: it did not ap-

Harman v. Spotswood.
Mich. 3 *G.* 3.
B. R. Cooke
B. L. 126.

[557]

pear in evidence that the judgment was entered up, or the execution sued out at the instance of the bankrupt: the Court were of opinion (the jury having found that the debt was *bonâ fide*, and the execution adverse) that the execution could not be deemed an act of bankruptcy.

8. "Another act of bankruptcy is suffering himself to be "outlawed." By stat. 1 Jac. 1. c. 15

Cooke B. L.
106.

But an outlawry in *Ireland* does not make one a bankrupt here, though an outlawry in *Durham* does.

Radfords v.
Bludworth.
3 Lev. 13.

But to make an outlawry an act of bankruptcy, it must appear to be suffered with an intent to defraud creditors.

9. By stat. 1 Jac. 1. c. 15. "it is further enacted as an act of bankruptcy, for a trader to yield himself to prison."

This means a voluntary yielding for *debt*; and if a person capable of paying, will notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy.

Ex parte
Burton.
Vin. Abr. title
Creditor, 62.

Therefore where a trader was arrested for 28 $\frac{1}{2}$ and having sufficient to pay it; yet chose rather to go to prison, in order, as he said, to compel his creditors to come to a composition, the Chancellor said, This is an act of bankruptcy within 1 Jac. 1. though without such *intent*, yielding himself to prison was no act of bankruptcy, unless he lay two months; otherwise where the party procures himself to be arrested for a sham debt, for that by stat. 1 Jac. 1. c. 19. is an act of bankruptcy.

10. Another act of bankruptcy is under stat. 1 Jac. 1. c. 15. "Making any fraudulent grant or conveyance of his lands, "tenements, goods, or chattels."

Under this statute it has been held,

Clavey v. Hay-
ley, Cowp. 427.
Martin v.
Pewtreffs.
4 Burr. 2478.

1. That the conveyance which shall be an act of bankruptcy under this head must be *by deed*; and a *fraudulent judgment and execution* though void against creditors, is not an act of bankruptcy.

Wilson v. Day.
2 Burr. 827.

2. Every assignment by a trader who becomes insolvent is not an act of bankruptcy; for a bankrupt may lawfully prefer one creditor to another, as he may make a mortgage to him; but *it must be with possession delivered*, except in the case of a ship at sea. So the bankrupt may assign over *part* of his property to a fair creditor in discharge of his debt, and it shall be good.

Smith v. Payne.
6 T. Rep. 152.

Hooper v.
Smith. 2 Black.
Rep. 441.

As where *Hooper* the bankrupt, being fairly indebted to the plaintiff, who was his mother, in 800 l . but finding himself declining, before any act of bankruptcy, assigned to her a parcel of silks, amounting to about 350 l . which was about *half his stock in trade*: of this he made a bill of parcels with
a re-

a receipt, as if sold in the ordinary course of trade, and afterwards conveyed the goods to her. In the evening of the same day, it was agreed that he should deny himself, and so become a bankrupt. The assignees having possessed themselves by stratagem of all the silks so assigned to her, she brought *trover*, and the question was, whether the assignment was an act of bankruptcy, and fraudulent? The doctrine laid down by Lord *Mansfield* was, That if a man having previously committed an act of bankruptcy, in order to pay even a just debt, *assigns all his effects* to the creditor, or all to several creditors, in *exclusion of any one or more*, that *that* is an act of bankruptcy; but that a preference by assignment to one creditor of *only part* of his goods, and that to pay only part of the debt, has been frequently held good. Though if a man makes over so much of his stock as disables him from being a trader, it would be fraudulent; but to say in the present case that that part of the stock would have that effect, would be going too far.

[558]

And a conveyance by deed to a child of the bankrupt, though declared to be void by stat. 1 Jac. 1. if made by a trader when he is insolvent, is fraudulent, and an act of bankruptcy.

Whitwell & al.
Assignees of
Stephens & al.
v. Thompson.
Espin. Cas. N.P.
68.

The doctrine above laid down has been confirmed by many cases. As,

1. An assignment by a trader before an act of bankruptcy, of *all his property, real and personal*, though given by way of security, and for a valuable consideration, was in this case adjudged to be a fraud on the bankrupt laws, and an act of bankruptcy.

Assignees of
Sladers v.
Demattos.
1 Burr. 567.

2. "A colourable omission of part of a bankrupt's property, if he assign *all his stock in trade*, is an act of bankruptcy."

Law v. Skinner.
2 Black. Rep.
996.

The bankrupt in this case assigned in consideration of 300l. two leasehold houses and *all his stock in trade* to the plaintiff to secure that sum, but *the household goods and debts were not included*, the mortgage was forfeited, and in consideration of 40l. he bargained and sold his household goods, but not the debts (which were trifling), to the plaintiff to secure the 340l. The assignees took possession of the goods, on which the plaintiff brought *trover*, and on a special case made, the Court determined that the assignment was an act of bankruptcy, for it being of all his stock in trade, he could not carry on business longer.

3. An assignment of the bankrupt's property to the exclusion of any of the creditors, is an act of bankruptcy. As was held in this case, where one *Gayner* a trader, on the 7th of June, made an assignment of all his effects, goods, stock in trade, &c. (except his household furniture, watches, plate, bills, and cash then by him) to trustees, in trust to pay themselves, and

Gayner's case
cited.
1 Burr. 477.

[559]

all the rest of the creditors, except *Ford* the petitioner; the trustees declining to act under this assignment, he executed another on the 9th of *June*, wherein the trustees were to pay themselves, and all the creditors mentioned in the schedule (in which schedule *Ford's* name was not omitted) and in this assignment a large parcel of ginger was excepted. On this coming before Lord *Hardwicke*, he was clearly of an opinion, that the deed of the 9th of *June* was of itself an act of bankruptcy.

But how far a general assignment to trustees for the benefit of all the creditors of the bankrupt is an act of bankruptcy, this case following goes some length to decide.

Kettle & al. Aff.
v. Hammond.
Sittings after
Hil. 7 G. 3.
Bull. N. P. 40.

In trover against a sheriff who had levied an execution on the bankrupt's goods; to prove an act of bankruptcy prior to the execution, the plaintiffs relied on an assignment made by the bankrupt of all his effects to two of his creditors, in trust for themselves and the rest of the creditors, in consequence of a proposition made by the bankrupt at a meeting of his creditors, and accepted by all present. *Per Lord Mansfield*—This deed is a fraud on the bankrupt-laws, and is an act of bankruptcy, unless every creditor concurred, which here is not the case, the plaintiff in execution being adverse.

4. "But it should seem that those partial assignments must be made only with a view to satisfy particular creditors to whom they are made, for if done for the purpose of defrauding the other creditors, and to give an undue preference, or made under circumstances when the trader cannot longer stand his ground, they are fraudulent, and acts of bankruptcy."

Atkins v.
Barwick.
1 Stra. 165.
Vid. Salte v.
Field, ante 539.

Therefore, where the defendants, who were mercers in London, on the 7th of *April* sent goods to the bankrupts, down into the country, and gave them credit for them in their books: on the 18th of *May*, the bankrupts, without the knowledge of the defendant, sent the same goods to a third person for the use of the defendants; and on the 4th of *June* became bankrupts: on the 6th of *June* they wrote to the defendants, informing them that their affairs being declining, that they had so disposed of the goods for their use. This letter was received on the 13th of *June*, and on the 9th this commission had issued: immediately after receiving the letter, the defendants signified their assent to it: on trover by the assignees, it was held, That the debt due was a good consideration; for thus transferring the goods was good as a satisfaction of debt, and that the property thereby passed out of them and reverted in the defendants until they shewed their dissent, which should not be presumed, it being for their interest; so that they might hold them against the plaintiffs (the assignees).

But where a trader *being in insolvent circumstances*, and unable to pay more than eight shillings in the pound, made an assignment, *in contemplation of a bankruptcy*, of a lease to certain of his creditors, this was adjudged to be an act of bankruptcy, though it was an assignment of but *part of his property*.

Devon v. Warts.
Doug. 86.
Linton v.
Bartlett.
3 Will. 47. S. P.

So where the defendant having, in order to support the credit of the bankrupt's house, immediately before its stopping lent the bankrupt 5000l. and he, on the evening before he absconded, inclosed bills to the defendant to the amount of 5000l. in a letter, in which he mentioned his having done so, as conceiving him *entitled to a preference*, the money was recovered back from him, by the assignees.

Harman v.
Fisher.
Cowp. 117.

Where one partner makes a fraudulent grant by deed of his shop effects to another partner, it is an act of bankruptcy in the former, but not in the latter.

Whitwell & al.
Assignees, v.
Thompson.
Espin. Cal. N.P.
71.

"The Court therefore allows no evasion of the statute."

As where the bankrupt made a *pretended sale* of part of his effects to his creditor, but which were *not in the way of the creditor's trade*, nor was there *any application or pressing for payment by the creditor*, but done by the bankrupt to give him a preference, it was held to be fraudulent. Vid. *Atkins v. Barwick*, ante 559.

Rust v. Cowper.
Cowp. 629.

And even if the assignment is in the way of the creditor's trade or business, yet if it is done *in contemplation of a bankruptcy*, it is void.

Hague v.
Rolleston.
4 Burr. 2174.

But if a trader, being fairly indebted and *apprehensive of being sued*, before any act of bankruptcy, assigns over to his creditor part of his property, though in fact his *apprehensions are groundless*, yet is the assignment good.

Alders v.
Temple.
4 Burr. 2235.
S. P.
Thompson v.
Freeman.

But an assignment by a trader, when resident abroad, of all his effects in trust for creditors in certain proportions, is not an act of bankruptcy upon which a commission may be sued out, for such should be in *England*.

1 T. Rep. 155.
Inch v. Grant.
5 T. Rep. 530.

11. "Obtaining any protection otherwise than being lawfully protected by privilege of parliament, is another act of bankruptcy." By stat. 21 Jac. 1. c. 19.

Of this sort was the entering into the service of an ambassador. But now, by stat. 7 Ann. c. 12. it is enacted, "That any person being a merchant or trader, who shall go into the service of any ambassador or foreign minister, shall not have any privilege."

But if any one be protected as a king's servant, it is not an act of bankruptcy.

Skin. 21.

Vernon v.
Hankey.
Sitt. G. Hall,
Tr. 27 G.
Cooke B. L. 125.

12. Another act of bankruptcy is "Paying to the petitioning creditor, or delivering to him goods or security for his debt, whereby he shall have privately more in the pound than other creditors." By stat. 5 Geo. 2. c. 30. § 19.

[561]

13. "Neglecting to make satisfaction for any just debt to the amount of 100l. within two months after the service of legal process, upon any trader having privilege of parliament, is another act of bankruptcy." By stat. 5 Geo. 2. c. 30. § 24.

But it is further enacted by statute 4 Geo. 3. c. 33. § 1. "That before any commission can be sued out against a member of parliament, it is required, That the creditor make and file on record in one of the courts at *Westminster*, an affidavit, that the debt is justly due to him, and that his debtor, as he very believes, is a merchant, &c. and within the description of persons who are objects of the bankrupt laws."

Hopkins v.
Ellis.
Salk. 110.

And note, That if a man commits a *plain act of bankruptcy*; as keeping house, &c. though he afterwards goes abroad and is a great dealer, yet that will not purge the first act of bankruptcy. But *if the act is doubtful*, then going abroad and dealing will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors and keep out of the way, it will not be an act of bankruptcy: also, if after a plain act of bankruptcy he pays off or compounds with his creditors, he is become a new man.

Colkett Aff. of
Falch v.
Freeman.
2 T. Rep. 59.

Therefore where a trader was denied to a creditor who called in the morning with a bill for payment, though by the custom of the city he had till five o'clock in the evening to pay it, and in fact did pay it in the course of the day, yet it was resolved, That having committed an unequivocal act of bankruptcy by the denial, it could not be purged or explained away by any subsequent circumstances.

3. The next thing to be considered is,

The Debt of the Petitioning Creditor.

1. By stat. 5 Geo. 2. c. 30. it is enacted, "That no commission of bankruptcy shall be sued out upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons being partners petitioning for the same, does amount to 100l. or upwards; or unless the debt of two creditors amount to 150l. or of three or more creditors to 200l. and the creditor or creditors petitioning for such commission shall, before the same shall be granted, make oath of the truth and reality of such debt."

1. In

1. In this case the bankrupt was fairly indebted to the petitioning creditor in upwards of 100l. but before the commission sued out, he had given to the creditor a bill of exchange, which reduced the debt to within 100l. ; but this bill of exchange was drawn on a person with whom the bankrupt had no dealing, and which was of course *not accepted*: the petitioning creditor kept the bill, and *gave no notice to the bankrupt of the non-acceptance*, and sued out the commission on the whole debt: in an action in which the bankruptcy came in question, it was insisted, that the petitioning creditor having neglected to give notice of the non-acceptance of the bill, *had by his laches made it his own*, and that therefore the petitioning creditor's debt being less than 100l. that the commission was irregular; the point being reserved, the Court was of opinion, That the bill being drawn on a person who had no effects of the drawer in his hands, that the notice of non-acceptance was unnecessary, as he never could sustain an injury for want of notice, and that so there could be no extinguishment of the amount of the bill of exchange; and that the petitioning creditor's debt was therefore sufficient.

Bickersdike v.
Bolman. B. R.
1 T. Rep. 405.

[562]

So where the bankrupt was indebted to the petitioning creditor in 100l. before his bankruptcy, but after an act of bankruptcy and which fact was known to the creditor, he received of the bankrupt 50l. by which his debt was reduced to less than 100l. and he sued out the commission on the debt standing under those circumstances; it was held, notwithstanding, to be a good debt to support the commission, for payment of the 50l. being made to the petitioning creditor after he knew an act of bankruptcy had been committed was void, so that the creditor could not retain it, and the original debt therefore remained, which was sufficient to support the commission.

Mann Aff. of
Stevens v.
Shepherd.
6 T. Rep. 79.

2. " Under this statute the petitioning creditor's debt
" must be a *legal one*."

For where the petitioning creditor's debt was *as assignee of a bond due by the bankrupt*, the commission was superseded; for he was only an *equitable creditor*.

Meddlcott's
case in Canc.
2 Stra. 899.

So where one *Alsworth* entered into an agreement to purchase from *Hylliard* an equity of redemption of an estate then in mortgage, for which he was to give 400l. and articles were signed accordingly. *Alsworth* paid 250l. and was to pay the other 150l. on the execution of the conveyances, but *Hylliard* refused to complete the purchase, upon which *Alsworth* sued out a commission of bankrupt on the debt of 250l. On a petition to supersede it, Lord *Hardwicke* doubted, whether a commission could be taken out on such a contract; for the remedy should have been a bill for performance of the contract, and no action could in strictness of law be maintained. But it appearing that since the issuing

Ex parte
Hylliard.
1 Atk. 147.

of the commission, *Alsworth* had taken an assignment of the mortgage, which he could hold till satisfied, he ordered the commission to be superseded.

3. "The debt must be a legal and good debt, and *for which an action can be maintained.*"

Barnaby's case.
1 Stra. 653.

For where a judgment had in this case been recovered against a trader, he was surrendered by his bail, and then charged in execution; after which the plaintiffs in that action sued out a commission of bankrupt, grounded on the debt for which the judgment had been obtained: the commission was superseded, the body of the debtor being in law a satisfaction for the debt.

Caf. K. B. 243.
Swayne v.
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2 Stra. 746.

So a man cannot be a bankrupt for a debt contracted during his infancy, though the act of bankruptcy was after he came of age.

[563]

"But a debt barred by the statute of limitations may be a good petitioning creditor's debt."

Quantoct v.
England.
2 Burr. 2628.

This is to be taken with this restriction, that such debt will be an insufficient one to support the commission, if the objection comes from the bankrupt himself, who on such ground may supersede the commission; but the objection that the debt was barred by the statute of limitation, will not lie in the mouth of a person sued by the assignees; for the debt is not extinguished by the limitation, and the bankrupt has acquiesced in it: neither will the Court presume a debt to be barred though six years have elapsed.

Fowler v.
Brown.
Sitt. Mich. 177.
Cooke B. L. 12.

And accordingly Lord *Mansfield* at *Nisi Prius*, ruled, That the statute of limitations does not prevent the creditor from taking out a commission of bankruptcy, but extends only to remedy by action mentioned in the statute, but does not extinguish the debt or take away any other remedy.

Ex parte James.
1 P. W. 610.

So where the debt due to the petitioning creditor was by bond, which was not due at the time of suing out the commission, the debt was held to be a bad one to support the commission.

This case was prior to the statute 5 Geo. 2. c. 30. which now allows creditors to the bankrupt by bills, bonds, or promissory notes payable at a future day, to petition for, or join others in petitioning for, a commission of bankruptcy.

Vid. Green's
Bank. Law. 80.
contra.

4. "The debt must be a subsisting debt at the time of the act of bankruptcy committed."

Toms v. Mitton.
2 Stra. 744.

For where in this case the petitioning creditor's debt was under a note drawn by the bankrupt after an act of bankruptcy committed, the commission was superseded, the debt being a bad one.

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But where the petitioning creditor's debt was a note of 100l. given by the bankrupt to A. B. before any act of bankruptcy, but *indorsed by A. B. to the petitioning creditor after an act of bankruptcy committed*, the debt was held to be insufficient to support the commission, the debt being due by the bankrupt when he became so.

Anon.
2 Willf. 135.
Ex parte Thomas. 1 Atk. 73.
Vid. Dinne v. Evans.
6 T. Rep. 57.

The authority of this case was confirmed by a subsequent one of *Bingley v. Maddison*. Cooke B. L. 22.

So where the bankrupt was indebted to the petitioning creditor by simple contract, and after a secret act of bankruptcy committed, *gave him a bond for the money*, it was held, That the bond did not so destroy the simple contract debt, but that it was a good debt whereon to ground a commission.

Ambrose v. Clendon.
2 Stra. 1042.

[564]

5. " But the debt on which the commission is grounded, need not have been *contracted during the time that the bankrupt carried on trade*.

For a debt contracted *before a man entered into trade*, will be a good one to support a commission.

Butcher v. Easta.
Doug. 282.
1 Sid. 411.

And therefore that resolution, That a trader cannot be a bankrupt for a debt contracted after he has left off trade, though he afterwards becomes a trader again, seems not to be law, since by the case of *Butcher v. Easta*, it is indifferent at what time the debt has been contracted.

But where a *man has quitted trade*, he shall not be liable to be made a bankrupt on account of his former trading, for after-contracted debts; though for a debt contracted during the trading he may, and even though after quitting trade he sells his remaining stock.

Sir R. Cotton
& al. v. Daintry
and Sir And.
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1 Sid. 411.

Where the petitioning creditor was *the administrator of the obligee of a bond given by the bankrupt*, but the bond had been given in the year 1765, the act of bankruptcy in 1773, and *the letter of administration granted in 1775*; this being subsequent to the act of bankruptcy, it was contended could not support the commission; but Lord *Mansfield* over-ruled the objection; for the intestate and administrator are *una eademque persona*: and so the debt was due to the petitioning creditor before the act of bankruptcy.

Ray Aff. of
Larkins v. Clerk.
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And therefore where a trader was indebted while in trade in 100l. and then quitted trade, and became indebted to the same creditor in another 100l. he afterwards paid 100l. to his creditor, without saying upon what account; *Holt*, Ch. Just. said, That it would be too rigorous not to allow this payment to be appropriated to the 100l. debt contracted while the debtor was in trade, so as to suffer him to be still liable to a commission of bankrupt: but he gave no absolute opinion on it.

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Vid. Green's Bank. Law. 80. contra.

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Meggott v.
Mills.
1 Ld. Raym. 287.
12 Mod. 159.

6. *In general*, the following have been allowed to be good petitioning creditors' debts, to support the commission:

Per Ld. Hard-
wicke.
1 Atk. 241.

1. *An arbitration bond*; for it is a debt at law, and binds the parties till set aside for corruption or partiality; and therefore may well support a commission.

Ex parte Lee.
1 P. W. 782.

[565]

2. The petitioning creditor's debt in this case amounted to 100l. but it was in *notes of the bankrupt, bought in at ten shillings in the pound*; it was held to be a good debt to support the commission, though it had been otherwise in the case of a bond.

Anon.
Moseley, 27.

3. Where an order was made that a solicitor's bill should be referred to a Master to be taxed, and that *all proceedings at law should in the mean time be stayed*, and while the bill was under taxation the solicitor sued out a commission *for the debt due by his bill*; on a petition to supersede it, it was held to be not a sufficient reason to supersede the commission; for the order for taxation extended only to the bringing of actions at law, and the other ordinary proceedings.

Ex parte Crisp.
1 Atk. 134.

4. A commission may issue *against one partner for a debt due by the partnership*. Vid. *Cooke B. L.* 18, & *caf. ibid. cit.*

Ex parte
Goodwin.
1 Atk. 100.

5. *The executor of a bankrupt* cannot sue out a commission grounded on a debt due to his testator, unless the commission against his testator has been superseded; for all debts due by him belong to his *assignees*.

The Commission.

4. The *Commission* is next to be proved, which is done by producing it under the great seal, and the petition to the Chancellor on which it was granted.

5. The next thing requisite to be proved in actions by *the assignees* of the bankrupt, is

The Assignment.

This is to be done by producing the deed itself, and proving the execution of it by the commissioners by the subscribing witness.

6. The last thing to be considered under this head, is

Property in the Bankrupt.

This includes every thing of which he is the visible or real owner; every thing of which he has the actual possession, or of which he has parted with or lost the possession after an act of bankruptcy committed, or in contemplation of it.

1. Of

1. Of Things of which he has Possession, or is the Real or Visible Owner.

1. To prevent a trader from injuring others, by deriving a credit from an appearance of stock or property which is not his own, it is enacted, by stat. 21 Jac. 1. c. 19. § 11. "That if any person shall at the time of his becoming a bankrupt have in his possession, order, or disposition, by consent of the true owner, any goods whereof he is the reputed owner, that the commissioners shall have power to sell the same."

Under this statute it has been held,

1. That it extends to *mortgages* or conditional sales as well as to absolute ones; so that where in this case a trader had mortgaged his goods, stock in trade, &c. and the mortgagee suffered him to remain in possession, this mortgage was adjudged to be within the statute, and void as against creditors; who recovered the goods and stock accordingly. Ryall v. Rolle. 1 Atk. 165. 1 Will. 260.

2. That it extends to *chofes in action*; as bonds, profits in s. c. trade, &c.

3. That though the mortgage is to a partner, who thereby is in possession, yet that the mortgage is void within the statute, if such partner allows the mortgagor to continue in possession, and appear still as a partner; for the opportunity of fraud is the same, and it is within the mischief of the statute. S. C.

2. "But the statute does not extend to assignments of *ships or cargoes at sea*."

For where *Williams* and *Wilder*, being partners, assigned to *Heathcote*, to whom they were indebted, two ships, together with the bills of lading, and policies of insurances on the goods on board; *Williams* and *Wilder* became bankrupts, and the assignees brought their bill against *Heathcote*, grounding themselves on the statute 21 Jac. no possession having been delivered: but Lord *Hardwicke* was of opinion, That the statute extended only to cases where the assignee could obtain possession of the goods assigned, but which he left in possession of the assignor, and so gave him a false credit; which case did not hold here, the ships being then abroad on their voyage. Brown v. Heathcote. 1 Atk. 160.

In such case of the assignment by mortgage of a ship, the delivery of the grand bill of sale is a complete transfer of the property in the ship; and such delivery is good within the statute. Atkinson v. Malling. 2 T. Rep. 462.

* "But the creditor or purchaser should take possession of the ship as soon as possible; for the delivery of the grand bill of sale will not be sufficient, if there was an opportunity of taking actual possession, and neglected." Cooke B.L. 380. * [567]

For

Stephens v. Solc.
 1 Vez. 352.
 Hall v. Gurney.
 Hil. 24 G. 3.
 Cooke B. L.
 380. S. P.

For where *Wm. Tappenden*, being indebted to the plaintiff in 1400l. for securing the payment, mortgaged to him some leasehold estates, wharfs, and *three hoys*; but he kept possession of the hoys, and soon after became bankrupt: the assignees got possession of the hoys: upon which the plaintiff filed his bill to compel the assignees to redeem the hoys, or that they might be sold to pay his demands: Lord *Talbot* dismissed the bill as far as it respected the hoys; the assignment being void under statute *Jac.* and ordered them to be sold for the benefit of the creditors.

3. "Neither does the statute extend to cases of goods sold by the bankrupt, of which he has only the temporary possession after the sale."

Ex parte *Flyn*
 & *Field* in re
Matthews.
 1 Atk. 185.

For where *Matthews* the bankrupt, having 500 barrels of tar, sold two-thirds of it to *Flyn* and *Field*, and it was agreed that *Matthews* should also send to them the other third on his own account, but that he should be at the expence of cartage, portorage, and shipping, and that he should lodge all the tar in a warehouse of his own till an opportunity of shipping it offered, there being none at that time: the tar was accordingly lodged in *Matthews's* warehouse; *Flyn* and *Field* paid for their part: *Matthews* became a bankrupt, and the tar was taken possession of by his assignees; but Lord *Hardwicke* held this not to be a case within the statute; for the words of the statute are "goods left in the possession, order, and disposition of the bankrupts;" which these could not be said to be, being merely temporary, and for a particular purpose.

4. "So neither does the statute extend to cases in which the bankrupt has not the order and disposition of the goods claimed."

Collins Aff. of
Kent v. Forbes.
 3 T. Rep. 316.

For where the commissioners of the victualling-office, having occasion to erect a stage at *Weevil* in *Hampshire*, for shipping barrels, and published an advertisement for carpenters to send in proposals; *Forbes* was disposed to take the contract, but being a general merchant, could not do it in his own name; he therefore agreed with *Kent* the bankrupt, who was a carpenter, that he should take the contract, for which he was to have one-fourth of the profits, and a guinea a week for superintending the work, and the rest was to belong to *Forbes*: the contract was accordingly so made, and the timber was bought by *Forbes*, and shipped in his name, and delivered into the king's yard as for *Kent's* use, and received as such by the king's officers; they swore that they should not have received it on account of any other person, nor that they would have permitted *Kent* himself to dispose of it in any other manner than for the work contracted for, except such parts as were unfit for the purpose, as they considered it as delivered for the purposes of

of the contract. Before the work was finished *Kent* became a bankrupt, and *Forbes* got possession of the timber; to recover which the action was brought. The Court were of opinion, That this was not such a possession in the bankrupt as should entitle the assignees under the stat. 21 Jac. for the timber was the property of the defendant, to whom no fraud was imputable; there was no sale to *Kent*, nor any general delivery so as to give him the absolute disposition of it; for the officers of the yard would not have permitted him to have sold it to any other, nor to have used it, except for the purposes of the contract: this therefore could not enable *Kent* to get credit on this property; they therefore gave judgment for the defendant.

5. " And it seems to be admitted as a general rule, That
 " in all cases where the bankrupt has made any sale or mort-
 " gage of any part of his property, of which possession
 " could not then be given, that where the person to whom
 " such sale or mortgage has been made has an opportunity
 " of taking possession of the property, and neglects to do
 " it, that he shall lose that equitable lien he is entitled to as
 " against the property; but that where he uses every means
 " to acquire the legal possession, that in that case he shall be
 " entitled."

For where *Syeds* the bankrupt having received advice from a correspondent in *America*, that a quantity of *Brazil-letto* wood was about to be shipped on his account, he procured an insurance thereon, and then applied to the defendant *Pasley* to advance him a sum of money on the credit of the goods and the policy of insurance; *Pasley* agreed to lend the money, and the bankrupt, by a stamped instrument, bound himself to deliver to the defendant the *Brazilletto* wood, and also to deposit in his hands the policy of insurance and letter of advice, and to indorse and hand over to him the bill of lading when it arrived. The policy and letter of advice were deposited with the defendant; the bill of lading was also indorsed over when it arrived, but it was after *Syeds* had committed an act of bankruptcy; this was on the 2d of *February*, and the commission issued the 10th; the ship arrived in *April*, and the defendant got possession of the goods, for which the plaintiffs now brought trover; Mr. Justice *Asbhurst* delivered the opinion of the Court, That as between a person who has an equitable lien, and a third person who purchases for a valuable consideration, and without notice, the equitable title, though prior, shall not overreach the title of the vendee; for the title of him who has a fair possession, and an equitable title, shall be preferred to that of a mere equitable title; but as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the thing, without discharging the money due; the party

Lempriere v. Pasley.
 2 T. Rep. 482.
Faulkner v. Case. cit.
 2 T. Rep. 491.
 1 Brown. 125.

party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors trusted to a personal credit, but *he* to the thing; the assignees must stand in the place of the bankrupt, and take the thing subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. It might be great inconvenience to commerce if it were to be laid down as law, that a man could never take up money on the credit of goods consigned till they actually arrived in port: there seems to be no inconvenience on the other side, nor can it be any inlet to fraud; for no person can be taken in to lend money on the credit of the cargo after the party has parted with all the documents, and delivered them to him who has the first lien.

6. "The statute extends as well to goods entrusted to the bankrupt by a third person, and of which by disposing of them he is the visible owner, as to cases where the bankrupt himself, being the original owner, remains in possession after having sold them; for the mischief is equal of creating a fictitious credit."

Mace v. Cadell.
Cowp. 232.

For where in this case, *Mace* the plaintiff kept a public-house, had a licence, and said she was married to one *Penrice*; she went to the excise-office, had his name entered in the books, with a note in the margin "*married*;" *Penrice* had the licence, and continued in possession of the house and goods from that time till he absconded, and so committed an act of bankruptcy: *Mace* the plaintiff claimed the goods in question; first, as under a bill of sale from *Penrice*; but afterwards as her own original property, and denied her being married to *Penrice*: the Court were of opinion, That this was a possession of goods in the bankrupt within the statute of *Jac.* and the plaintiff was nonsuited.

Bryson v. Wylie.
Cooke B.L. 391.

[570]

So where *Bryson* being possessed of a dyer's plant, sold it to *Simpson* for 165l. 16s. 6d. *Simpson* gave *Bryson* two promissory notes in payment, dated 19th of *January* 1780; one for the sum of 82l. 13s. 6d. payable the 4th of *January* 1781; the other for the same sum, payable the 6th of *January* 1782: when the first note became due, *Simpson* was unable to pay it; and *Bryson* offered to take back the plant, and return the notes, and agreed to let him have the plant at the rate of 5l. *per ann.* for the term of three years: to this proposal *Simpson* agreed, and a deed was accordingly executed, by which it was agreed that *Bryson* should let the plant to *Simpson*; and that if he should make default in any of the quarterly payments, or in the performance of any of the covenants, that the term granted should cease, and *Simpson* should deliver up the plant to *Bryson*. There was a memorandum at the bottom of the deed, that *Bryson* had put

Simpson in full possession of the plant, by delivering to him a winch in the name of the whole. On the 5th of *July* 1783, *Simpson* had a commission sued out against him; and the messenger took possession of the plant: the Court held clearly, That this was a possession in the bankrupt, within the statute of *Jac.* and belonged to the assignees.

“ But in such case the bankrupt must *appear as the owner* ;
 “ for if from the nature of his business the presumption of
 “ the goods being his property is excluded, they shall not
 “ be liable to his bankruptcy.”

As in the case of *goldsmiths and factors*, who do not deal on their own stock, but that of others: as in this case, which was trover against the assignee of one *Levi*, to whom before his bankruptcy the plaintiff *had entrusted a parcel of diamonds to sell*; on a case made, the Court of *King's Bench* were of opinion, That the bankrupt having no more than a *bare authority to sell for his use*, that they were not liable to *Levi's* bankruptcy.

L'Apostrie v.
Le Plaisirier.
 1 P. Wms. 318.

“ So in the case of *factors*, goods consigned to them merely
 “ for sale, are not liable to their bankruptcy.”

For if a merchant consigns goods to a factor, and he becomes a bankrupt, the goods still remaining in his possession, they shall still be deemed the property of the merchant; and he may recover them in this action.

Godfrey v.
Furzo.
 3 P. Wms. 185.

So if the factor had sold the goods consigned to him, and received the money, and died indebted in debts of an higher nature, if it could be proved that the money so received had been invested in other goods, these shall be deemed to belong to the merchant's estate, not to the factor's; but if the money had remained in specie, it had belonged to the factor's estate, and gone to answer the debts of an higher nature; for the money has no mark to be followed by.

Whitcomb v.
Jacob.
 1 Salk. 160.

But where the factor had for the merchant's goods taken notes, instead of money, the Court of Common Pleas held,
 * That the merchant should have the notes, as they could be traced.

Per *Ld. Hard-*
wicke.
 1 Ark. 234.
 * [571]

And so if a factor had sold the goods consigned to him, and become a bankrupt, the merchant must come in as a creditor under the commission; though if he had *laid out the money in other goods* for the merchant, the merchant shall have them: so if the factor had sold for payment at a future day, the merchant shall have the money.

Scott v. Salmon.
Hil. 16 G. 2.
C B.
Buller N. P. 43.

As where the plaintiff, living in *Ireland*, employed *B.* in *London* to sell goods for him: *B.* sold them to *J. S.*; the plaintiff at the time was ignorant to whom they were sold, and *J. S.* was ignorant whose property they were; *B.* be-
 came

Garret v. Cul-
lum. E. 1708.
Buller N. P. 42.
last edit.

came a bankrupt, and J. S. paid the money to the defendants, his assignees: the plaintiff brought an action for the money against the assignees, and recovered; for though it was agreed, that a payment by J. S. to B. was a discharge for him against the plaintiff his principal, yet the debt was not in law to him, but to the plaintiff whose goods were sold; and therefore was not assigned to the defendants under the general assignment of all their debts, but remained due to A. as it was before; so that being paid to the defendants who had no right to it, it was a payment under a mistake, and so was recoverable from them.

Ex parte Murray. Cooke B.L. 415.

And where the factor had a *del credere* commission, the same point was decided by the chancellor.

“ And the case is the same of goods which the bankrupt has in his possession, as *executor or administrator*, for the statute does not extend to these.”

Ex parte Marsh. 3 Atk. 158.

For where one *Marsh* died possessed of about 2000*l.* and some plate, leaving a widow and children, the widow married a man who became a bankrupt: the question was, Whether the assignees of the second husband were entitled to the plate which had been left in the possession of the bankrupt? Lord *Hardwicke* said, That it certainly was not within the statute; because the administratrix had them in *auter droit*, and the husband could have them in no better right, and therefore they could not belong to his estate.

7. “ So that the criterion of what possession shall subject the goods of others in a trader’s possession to his bankruptcy, is the exertion of any act of ownership unconnected with any circumstances of doubtful property, or the appearing to have such power and right.”

Walker v. Burnell. Dougl. 303.

[572]

Jarman v. Wollerton. 3 T. Rep. 618.

Therefore, where a bankrupt was left in possession of his house and goods by his assignees, after obtaining his certificate, *for the purpose of collecting his debts*, and during that time traded for himself, it was adjudged, That this was not such a possession as should subject them to be taken by the assignees under a second commission.

So where in trover by the plaintiff as trustee for the wife of the bankrupt, the case was, That on the intermarriage of the wife, by deed made previous to her marriage, all the wife’s stock in trade as a milliner, book-debts, and other effects of the wife, were assigned to the plaintiff in trust for her separate use; there was no schedule, but an inventory of the furniture; at that time, and for some time after the marriage, she carried on business at a house apart from her husband, in *Welbeck-street*, but some time after, she removed to his house in *Marybone-street*, where he was a linen-draper; and carried on her business in a separate apartment: it appeared that the husband

band paid the rent of the house, and had been at the expence of fitting up the shop, but there was contradictory evidence as to the manner of the wife's carrying on her business, whether for her own separate use or not. The jury found that it was not carried on separately, and found a verdict for the defendant for the stock in trade; but for the plaintiff for the furniture: it was moved, to set aside the verdict as to the furniture, as being a possession under stat. of *Jac.*; but the Court refused it, they being of opinion, That there was not such an order and disposition by the consent of the true owner, as was within the statute; that the trustee was the legal owner, and he gave no consent for such purpose; and the wife's possession, in the manner proved at the trial, was no evidence of fraud, for she was the agent of the trustee: an objection was made on the part of the defendant, that there was no schedule when the deed was made; but the Court held, That there was nothing in the objection.

2. These are cases in which the bankrupt is in possession of goods at the time he becomes a bankrupt, and which are recoverable under the circumstances now mentioned; but goods of which he has not the possession, if they have got into the hands of others after an act of bankruptcy committed, are in like manner recoverable in this action. 1. For the assignment of the bankrupt's property has a relation to the act of bankruptcy, and the assignees stand in the bankrupt's place from that time; that is, the property is in them from that time, and they may maintain trover for all goods of the bankrupt of which others have obtained possession from that period.

Monk v. Morris.
1 Vent. 193.

" And it makes no difference whether the property was
" in England or elsewhere, for it all belongs to the assignees,
" and is by them recoverable."

[573]

For where the defendants were considerable creditors of the bankrupt, and resided in *England* at the time of the bankruptcy; upon the issuing of the commission, they knowing of its issuing sent out an order to their attornies in *Rhode Island* in *America*, to attach property of the bankrupt's there; the attachments were made there, and the proceeds, amounting to 496*l.*, remitted to the defendants in *England*; to recover which the action was brought: it was resolved, That by the bankruptcy the whole property of the bankrupt vested in the assignees, and that therefore it could not be attached by any creditor in *England*; and that whatever he received under such attachment, he was liable to be called upon to refund to the assignees.

Hunter v. Potts.
4 T. Rep. 182.
Phillips v.
Hunter
2 H. Black. 402.
S. P.

But the person abroad who has so had the bankrupt's property recovered from him, is not, on his coming to *England*, liable to the assignees; for having parted with it under the coercion

Le Chevalier
v. Lynch.
Doug. 170.

of a court of competent jurisdiction, that shall justify him in law.

2. "Where the assignment of the goods is itself an act of bankruptcy, and so the goods assigned are recoverable in this action, has already been mentioned; where an act of bankruptcy has been committed, and any person obtains possession of them *afterwards by any means*, they are in like manner recoverable."

Coppendale v.
Bridgen.
2 Burr. 814.

As where the bankrupt had been arrested on the 2d of May, and on the 4th was charged in execution: on the 17th of June a *fieri facias* issued against him to the defendant the sheriff, who on the 26th levied the money: on the 5th of July the commission was taken out on the act of bankruptcy of lying in gaol two months, after which the sheriff returned *nulla bona*, and the return was adjudged to be good; for by the relation the property was in the assignees from the 2d of May.

Cooper v. Chitty
and Blackiston.
1 Burr. 20.
1 Black. Rep.
65. S. C.

So where the defendants, who were sheriffs of London, had seized the goods of the bankrupt, after an act of bankruptcy committed, but before a commission had been sued out; but before a sale, a commission had been sued out, and an assignment made, notwithstanding which the defendants sold them; they were held to be liable to trover.

Rush v. Baker.
2 Stra. 996.

Or the action may be maintained against the plaintiff who sued out the execution as well as against the sheriff, if he can be proved a party to the conversion by giving bond to secure the sheriff, and so making the act his own.

[574]

But to this there are two exceptions:

Audley v.
Halfey.
Cro. Car. 148.

1. Where an *extent* issued on a statute, and the conusor became bankrupt after the execution of the extent, but *before the liberate*; in trover by the assignees against the defendant, who had got possession under the liberate, the Court held, That the property was divested out of the bankrupt by the extent, and that the goods were therefore not assignable. *Note*, The extent was of the 21st of October, the act of bankruptcy was on the 3d of November, the liberate was sued out on the 6th, and the commission issued the 8th of the same month.

1 Atk. 262.

2. The second exception is in the *case of the crown*, for the king is not bound by any of the statutes of bankruptcy, he not being named in them; so that he is not affected by the relation, but only by the *actual assignment*, which changes the property.

Brassey v.
Dawson.
2 Stra. 978.

As where the bankrupt was *indebted to the king*, as collector of the land-tax for the precinct of Aldgate, and the commissioners of the land-tax issued their warrant and seized his effects

effects after an act of bankruptcy committed; but the goods were not taken away till after the assignment under the commission; it was held, That the goods being in the hands of the crown from the time of the seizure, were not affected by the act of bankruptcy which preceded it.

So where one *Edward Lewis* was indebted to the king by bond, dated the 3d of *March*, 19 *Car. 2.*, an extent issued upon that bond tested the *same day with the date of the assignment under a commission of bankruptcy* against *Lewis*; when it was held, That the extent should be preferred.

Rex v. Crump & Hanbury.
Parker's Rep.
126.

And where it is enacted by stat. 8 *Ann. c. 19.* "That all *candles*, and all the materials for making them, should be *subject to the debts and duties to the crown, and all penalties and forfeitures for the same;*" it was adjudged, That where a candlemaker was in debt for the single duties, and became a bankrupt, and *after the assignment* was convicted in the double duties, that this was a lien on the candles, utensils, &c. in the hands of the assignees, and might be taken from them under the statute, *notwithstanding the assignment*; for the assignees are the representatives of the bankrupt, and they are liable to every equity that would affect him.

Stracey v. Hulfe.
Dougl. 395.
Rex v. Fowler,
& Attorney
General v.
Senior.
Ibid. S. P.

Therefore where an extent issues, it shall always be *tested of the true day it issues*, and shall not be *ante-dated* so as to over-reach any mesne assignments.

Rex v. Mann;
2 *Stra.* 729.

How far the crown is entitled to a preference by extent against a subject, depends upon stat. 33 *H. 8. c. 39.*; by which it is enacted, "That if any suit be commenced or taken, or process awarded for the king, that the king's suit shall be preferred, and that he shall have the first execution against any person for his debts, *so always the king's suit be taken and commenced, or process awarded for the said debt at the suit of the king, before judgment given for the said other person.*"

[575]

Under this statute it has been held,

"That if execution upon a judgment issues against the goods of the king's debtor, under which the goods are taken, and afterwards an extent issues, that those goods cannot be taken under the extent."

As in this case, where the plaintiff, in *Easter term* 17 *Geo. 3.*, recovered a judgment in the *King's Bench* against one *Thomas Cann*, and on the 16th of *April* sued out a *fi. fa.* a warrant of which was on the 18th delivered to an officer of the sheriff of *Surry*, who on the same day took the goods in execution: on the 24th of *April* an extent issued, and was delivered to the sheriff before sale at the plaintiff's execution, and the sheriff returned *nulla bona* on the plaintiff's writ: on an action being brought for the false return, the

Uppom v.
Sumner.
2 *El. Rep.* 1251.
Rorke v.
Dayrell.
4 *T. Rep.* 402.
S. P.

Court held, That by taking the goods under the plaintiff's execution, that they were bound, and the extent could not prevail.

3. How far in the case of partners the acts of one shall be affected by the bankruptcy of the other in the disposal of the bankrupt effects, *vid. Fox v. Hanbury, post.*

2. OF TROVER, WITH REFERENCE TO THE PERSON.

Under this head I shall consider, 1st, By whom this action may be maintained: 2d, Against whom it lies.

1. BY WHOM TROVER MAY BE MAINTAINED.

1. "*Possession* alone gives a sufficient title to maintain " this action against all persons, except against the owner."

*Armorie v.
Delamirie.
1 Stra. 505.*

As where a person *finds anything*; this gives him such a property as will maintain this action against any person who takes it from him, except the rightful owner.

*Basset v.
Maynard.
Cro. Eliz. 810.
5 Co. 24. b.
S. C.*

*[576]

So where Sir Thomas Palmer, seised of a wood, sold 600 cord of the timber of it to one Cornford and his assigns, to *be taken by the assignment of Sir Thomas Palmer; and Cornford assigned his right to the plaintiff: Sir Thomas afterward sold 4000 cord of timber of the same wood to the defendant, to be taken at the defendant's election; the 600 cord of wood was marked out by Sir Thomas to the plaintiff, who cut it, and the defendant took it away; on which the plaintiff brought trover and recovered, for though the defendant had a right of 4000 cord of wood to be taken in any part of the wood, yet the plaintiff having cut, and got possession of the wood, had thereby a good and sufficient title.

*Rackham v.
Jeffup & al.
3 Will. 332.*

So where the plaintiff, claiming a right of common, had cut six load of rushes which grew thereon, and the defendant denying the plaintiff's right, had taken and carried them away, the plaintiff recovered in trover for them; for though the right of common might be doubtful, yet having by possession obtained a special property in them, he could well maintain an action against a stranger.

" But actual possession is *not necessary* to maintain this " action."

*Lord Cullen's
case,
Mich. 14 G. 2.
Bull. N. P. 33.*

For where in ejectment for a mine, it was offered in evidence in proof of possession, that the lessor of the plaintiff had had a verdict in trover for a parcel of lead dug out of the mine, it was held not to be sufficient proof of possession, as trover might be maintained without possession.

" For a *right of possession* is sufficient."

As where *A.* being indebted to the plaintiff, and the defendant to *A.*, and it was agreed between them that the defendant should deliver goods to the plaintiff in satisfaction of *A.*'s debt, the defendant did not do so, but converted them to his own use; it was held, That the plaintiff might maintain trover, *though he never had had possession of the goods.*

Flewelling v.
Rave.
1 Bullst. 68.

"But if a party has neither the actual possession, nor right of actual possession, trover will not lie."

For where the plaintiff, who was the landlord of an house, let it ready furnished, and the furniture was taken in execution by the defendant, who was sheriff of *Kent*, on a judgment against a former owner, from whom the plaintiff had purchased, it was adjudged, That as the plaintiff had let the furniture for a time, which was then unexpired, so that he had not then a right of possession, that *he* could not maintain the action.

Gordon v.
Harpur.
7 T. Rep. 9.

2. "But to support this action, *property* in the plaintiff is essentially necessary."

For where the plaintiff had ordered a tradesman to send goods by an hoyman, and the tradesman sent the goods by a porter to the house where the hoyman resided when in town; but he not being there, the porter left the goods with the landlord of the house, and the goods were lost; it was held, That the plaintiff could not have trover for the goods; for the property never vested in him for want of delivery, but still remained in the tradesman: though it had been otherwise, had the delivery been to the servant of the hoyman, or one employed by him to receive goods; for a delivery to them would have vested the property in the plaintiff. *Ante*, fol. 14.

Colston v.
Woolston.
Trin. 3 Ann.
Per Holt, at
G. Hall.
Bull. N. P. 35.

[577]

So where the plaintiff had exchanged an horse with the defendant, and given possession of it, it was held, That though the exchange might have been unfair in the warranty, yet that trover would not lie for it, for *the property was gone out of the plaintiff by the exchange.*

Power v. Wells.
Cowp. 819.
2 Ref.

So where goods were condemned in the Exchequer, and proclaimed as forfeited, it was adjudged, That *the property was thereby so altered*, that neither trespass nor trover would lie against the person who had seized them.

Ekins v. Smith.
Sir Th. Raymond, 336.

"But a parol gift of goods, without some act of delivery, will not transfer a property."

For where the plaintiff's intestate lodged at the defendant's house, and had furniture and plate there, and was proved to have said, that whatever he brought into those lodgings he would never take away, but give to the defendant's wife: and now upon trover for these things, it was ruled at *Nisi Prius* by the Chief Justice, That a parol gift without some act of delivery, would not alter the property,

Smith v. Smith.
2 Stra. 955.

and that such an act was necessary to establish a *donatio mortis causa*. It then became a question, if there had been any delivery? and to prove one, the defendant shewed, that the intestate when he left town, used to leave the key of his rooms with the defendant; and this was ruled to be sufficient, and the defendant had a verdict.

1. "But an *absolute property* is not necessary, as a person "having a *special property* may maintain the action."

Wilbraham
v. Snow.
1 Lev. 282.

As where the goods are seized by the sheriff under a *fi. fa.* the sheriff may maintain this action against any person for taking and converting them to his own use.

1 Mod. 31.

So a carrier may maintain trover for goods entrusted to him to carry, which have been taken out of his possession.

Per Powell,
Middl. Circ.
Bull. N. P. 33.

So if an house let for years be blown down, the lessee may have trover for the timber, though the property be in the reversioner.

Sir Wm.
Courtney's case.
Salk. MSS.
Bull. N. P. 33.

So the lord of a manor who seizes an *estrays* or wreck, may, before the year and day expired, have trover for it against a stranger; for he has a possession that may become a property.

Elizabeth
Countess of
Rutland v.
Isabel Countess
of Rutland.
Cro. Eliz. 377.

*[578]

* 3. It was formerly the opinion, That *executors* could not maintain this action (*Savill* 133); but it is now settled that they may have this action for a conversion of goods in the lifetime of their testators, by the equity of stat. 4 Ed. 3. as well as for a conversion in their own times.

Under this head it has been resolved,

Tremling v.
Clutterbook.
Style 48.

1. That if the wife is *executrix*, the husband may join in the action; for the possession of the wife, as *executrix*, is the possession of the husband, and the damages recovered may concern them both.

Lord Hastings
v. Sir Archibald
Douglas.
Cro. Car. 343.
2 Vern. 246.

2. If the husband devises away jewels, or such things as are *paraphernalia* to the wife, she cannot hold them; but they are recoverable by the husband's executor from her. But if the husband dies *intestate*, or by will does not dispose of the jewels, &c. she shall have them.

Long v. Hebb.
Per Rolle,
Ch. Just.
Style 341.

4. An administrator may maintain this action for the taking of the goods of the intestate by one before the letters of administration granted; for the letters of administration relate to the death of the intestate.

1 Stra. 60.

So he may for a taking in the lifetime of the testator.

Under this head it has been decided,

1. That an executor *de son tort* is liable to this action at the suit of the administrator.

And

And though in such action it appeared that the goods for which the action was brought had been taken in execution, upon a judgment obtained against the defendant as executor *de son tort* by a creditor of the intestate, yet it was held to be no discharge; for men should be discouraged from meddling with intestate estates: though this had been a good discharge *against another creditor* who sued him in the same right.

Anon.
1 Vent. 349.

2. If an administration has been granted to any person, and the administration is afterwards repealed, and administration granted to another, the first administrator shall not be liable in this action for the goods which he disposed of; but all dispositions by him made shall be valid.

Wilson v.
Packman.
Moor, 396.
Cro. Eliz. 459.
S. C.

3. It was held by two justices in this case against *Holt*, That where a person, before administration granted to him, permitted a person to take the goods of the intestate, that this assent should bar him in an action of trover for these goods brought after administration granted.

Whitehall
v. Squire.
1 Salk. 295.
3 Mod. 276.
S. C.

* 5. *Baron and feme* may join in this action for goods which were the property of the wife before marriage, and which goods came to the hands of the defendant before marriage, though they have been converted after; for though the conversion is the ground of the action, and therefore the husband may sue alone, yet the inception of the cause of action was in the wife, by the trover before marriage.

Blackbournetux.
v. Graves.
2 Lev. 107.
1 Vent. 260.

* [579]

2. AGAINST WHOM THIS ACTION MAY BE MAINTAINED.

1. "The owner of goods may maintain trover for them
" against any person into whose hands they may have fallen,
" though the person in whose possession they are found may
" have honestly obtained it, provided it was not *by sale in*
" *market overt*, or *by other fair transfer*."

As where the plaintiff *left jewels sealed up with his banker for safe custody only*, and the banker broke open the seal and pawned the jewels to the defendant, the plaintiff brought trover for them; when it was adjudged, 1st, That the banker being a mere bailee for safe custody, had no authority to open the bag; and by so doing was a trespasser: 2d, That the defendant could obtain no property in the jewels, except by a sale in *market overt*: 3d, That pawning was no sale in *market overt*, and therefore that the property still remained in the owner; (the plaintiff,) who might well maintain this action to recover them.

Hartop v.
Hoare.
1 Will. 8.
2 Stra. 1187.
S. C.

So where the plaintiff gave lottery-tickets to a goldsmith to receive the money for him, and the goldsmith having before given to the defendant a note to deliver to him so many lottery-tickets, delivered to him the tickets he had received from the plaintiff; it was adjudged, That this was not such

Ford v. Hopkins
Salk. 283.

a transfer as changed the property, but that the plaintiff might maintain trover for them.

G. b.'s case.
1 Leon. 158.

So where in trover for a horse, it appeared that he had been stolen from the plaintiff by one *P.*, who had sold him to the defendant, *under the name of Lyfter*, in market overt, and the assumed name of *Lyfter* was entered in the toll-book; it was adjudged by the Court, That this *being by a false name*, was not such a sale as should alter the property.

“ But where there has been a *fair and regular transfer* of the thing in question, this action will not lie.”

Anon.
1 Salk. 126.
* [580]

* As where a bank bill, payable to *A.* or bearer, was lost by *A.* and found by a stranger, who transferred it to the defendant; it was held, That though *A.* might have trover against the stranger, yet that it would not lie against the defendant, who by the fair course of trade had obtained a property in it. Vide *Miller v. Race*, ante, fol. 39.

2. “ *When the taking of the goods has been tortious*, an actual conversion to the party's own use is not necessary to maintain this action.”

Tinkler v.
Poole.
3 Willf. 146.
5 Burr. 2657.
S. C.
Chapman v.
Lamb.
2 Stra. 943.

As in the case of goods seized by custom-house officers which are not liable to duties, as the wearing apparel and necessaries of passengers on board ships; for these trover will lie against the custom-house officers who may have seized them, though the goods are lodged in his majesty's stores, and so are not converted to the use of the defendant the officer.

Shipwick v.
Blanchard.
6 T. Rep. 298.

So where the plaintiff's goods were taken as a distress by the defendant, claiming as assignee of the plaintiff's landlord, under a bankruptcy, but which commission could not be supported, and the plaintiff paid a sum of money to have the goods restored; it was adjudged, 1st, That though the taking them was as a distress and in the character of assignee, not tortiously for the party's own use, that it was a sufficient taking to support the action; and 2dly, That the receiving money from the plaintiff in order to have them returned, was a sufficient conversion.

“ So trover will lie against a servant for goods which he has wrongfully obtained, though they have been converted to the use of the master.”

Perkins, Aff.
of Hughes,
v. Smith.
1 Willf. 328.

For where *Hughes*, the bankrupt, was possessed of the goods for which the action was brought on the 22d of September, on which day he became a bankrupt: on the 23d of September the defendant *Smith*, who was servant and rider to Mr. *Garraway*, to whom the bankrupt was considerably indebted, went to his shop to get the money, which was shut up; but the bankrupt delivered to him the goods in question, and he gave a receipt for them in his master's name,

and sold them for his use: it was objected, That the action would not lie, the conversion being to the *master's use*; but *per Cur.* The point is, Whether the defendant is not a wrong-doer? if he is, no authority he could derive from his master could excuse him. The bankrupt had no right to deliver the goods to *Smith*, nor *Smith* to dispose of them; and the gist of the action of trover is the disposal and conversion of the goods of another wrongfully.

"But where *the taking has not been tortious*, there must be some evidence of a *conversion*."

As where trover was brought against the defendants as wharfingers, to *whom certain goods of the plaintiff had been delivered*, and which they had not delivered to the owner. The goods were lost or stolen out of the defendants' possession. The plaintiff, before the commencement of the action, demanded the goods and tendered the wharfage; the goods not being delivered, he brought this action for them, when it was held, That for goods stolen or lost out of the wharfinger's possession, this action would not lie; for to maintain trover an injurious conversion ought to be proved, and that a *bare non-delivery* was not sufficient, as this might have been a *mere omission*, for which the remedy should be an *action on the case*, not trover, which supposes an actual wrong.

Ross v. Johnson and Dawson.
5 Burr. 2825-

[581]

But where a carrier was intrusted with goods to carry, and by mistake delivered them to a wrong person, it was ruled by Lord *Kenyon*, that trover was maintainable against him.

Youll v. Harbottle.
Peake Cas. N.P. 49.

Aliter if the carrier had lost the goods by negligence.

Anon.
Salt. 655.

"But if one man is entrusted with the goods of another, and puts them into the possession of a third person, contrary to orders, it is a conversion; and trover may be maintained for them."

As where the plaintiff was owner of goods on board the defendant's vessel, then lying in the *Thames*, and he directed the defendant not to land the goods at the wharf at which the vessel lay: the defendant promised not to do so, but afterward, apprehending that the wharfinger had a lien for his fees on the goods, because the vessel was unloaded at the wharf, he delivered the goods to the wharfinger, who was ready to deliver them on payment of the fees. It was objected, that the action should be *case* for the misdelivery, and that trover would not lie, as the plaintiff's right to the goods was not denied; but it was adjudged, That though the right was so admitted, that a charge was brought on the plaintiff for the fees; and the goods being delivered against the owner's orders, and no right being shewn to the wharfage as set up, that it was a conversion, and the action maintainable.

Syeds v. Hay.
4 T. Rep. 200.

"It

"It is not necessary to support this action that the owner should be absolutely *deprived of his goods* by the conversion of him who has had possession of them; for damages are recoverable in this action for any *partial conversion or user* of the goods of another by the owner, after he has recovered possession of them."

Richardson v.
Atkinson.
1 Stra. 576.

As where a carrier took part of the liquor out of a vessel which he was employed to carry, and filled it up with water; it was adjudged to be a conversion of the whole, and the plaintiff recovered accordingly.

Per Popham,
Goldsb. 155.
1 Danv. 21.

So if a man takes my horse and rides him, and afterwards delivers him to me, yet I may maintain trover against him; for the riding is a conversion, and the redelivery will only go in mitigation of damages.

4. "Wherever the law has given a *lien* upon any goods or other things of value, there the retaining of them shall not subject the person to an action of trover."

Per Lord Mans-
field.
4 Burr. 2221.
*[582]

* 1. This doctrine in favour of liens, the courts of late years have much leaned to, for the convenience of trade; allowing it, first, Where there is an *express contract to that effect*; and secondly, Where it is *implied*, either from the *usage of the trade or the manner of dealing between the parties*.

Krutzer v.
Wilcox.
2 Burr. 956.
Drinkwater v.
Goodwin.
Cowp. 251.

As, 1. A *factor* has a lien upon goods consigned to him, not merely for what is due for those goods, but for the *balance of a general account*, and for which he may retain them. So he has a lien on the money in the hands of the buyer.

Foxcraft v.
Devonshire.
2 Burr. 932.
1 Bl. Rep. 193.

And though, in this case, goods had been consigned to a factor by a trader, and the *factor knew the trader was in insolvent circumstances*, but he, nevertheless, advanced him money on the credit of the goods; it was adjudged, That he was entitled to a lien against them for the money he had advanced, and should hold them against the assignees of the consignor.

Jourdain & al.
Att of Lefevre
v. Nowlan.
Etp. C. N.P. 66.
Naylor v.
Mangles.
Espin. Caf. N.P.
309.

So bankers have a lien on bills or notes paid into their houses for the balance of a general account.

So has a wharfinger on goods brought to his wharf.

2. "In the case of *manufacturers*, the lien which they have against the goods entrusted to them to manufacture, is not a general one, but confined to the *work done to the goods themselves*, unless the express usage of the trade is proved to the contrary."

Ex parte
Ockenden.
1 Atk. 235.

As where the bankrupt was a flour-factor, and had employed the petitioner, who was a miller; and he having always a large quantity of corn in his hands, and a great number

number of sacks, had, relying on these as a security, trusted the bankrupt very largely; and when he became bankrupt, he owed to the petitioner 286*l.* for grinding done before, and 16*l.* for grinding corn then in hands, which corn and sacks the petitioner insisted upon holding for his debt. But Lord *Hardwicke* held, That as the petitioner had shewn no general custom for a lien, that it only depended on the bailment proceeding from a delivery of goods for a particular purpose, *which could not be extended beyond the work done to the goods themselves.*

So that a manufacturer who takes in goods for a particular purpose (as to dye them) has a lien on them *for the work done to the goods themselves*; but cannot retain them *for any other demand against the owner of the goods*, was held by the *Court of King's Bench* in this case.

Green v. Farmer.
4 Burr. 2214.

Yet, where the dyers in the neighbourhood of *Manchester* had published resolutions, agreed upon amongst themselves at a public meeting, That they would not receive any more goods to be dyed, &c. but on condition that they respectively should have a lien on those goods for their general balance; the *Court of King's Bench* held this to be good in law, and that any one, who after notice of it delivers goods to any of those dyers, must be taken to have assented to those terms, and consequently cannot demand goods so delivered without paying the balance of his general account.

Kirkman & al. Aff. of Walker v. Shaw.
6 T. Rep. 14.

“ But the *usage of trade* will create a *general lien.*”

As where it was proved to be the usage for *packers* to lend money to clothiers, and the clothes left to be packed were considered *as a pledge*, not only for the packing, but *for the loan of the money likewise*; and here the bankrupt, who was a clothier, having borrowed money on a note of hand from the petitioner, who was a packer, but *at a time when he had no dealings with him*, and the bankrupt having afterwards sent him cloth to pack, it was held, That he might retain the cloth for the debt, as well as for the price of packing.

Ex parte Deeze.
1 Atk. 237,
& 228.
Downman v. Mathews.
Pre. Chanc.
580. S. P.
* [583]

3. “ In the case of *pawns*. The pawning, from the nature of the transaction, creates of itself a lien.”

And where a testator had borrowed a sum of money upon jewels, and afterwards borrowed three other several sums, for each of which *he gave his note*, without taking any notice of the jewels, it was determined in Chancery, That the borrower's executors should not redeem the jewels without paying the money due on the notes; for it must be presumed that the pawnee trusted to the pledge he had in his hands, by the money being lent subsequent to the pawning, which excluded the presumption of any trust to the person: but if the loan had been prior to the pawning, there had been no lien.

Demainbray v. Metcalf.
Prec. Chanc.
419.
2 Vern. 691.
S. C.
Quot. 1 Atk. 236.

“ But

" But though the act of pawning creates a lien in favour of the pawnee, yet it cannot give him a greater interest in the thing pawned than the pawner himself had."

Hoare v. Parker.
2 T. Rep. 376.

'Therefore where a *tenant for life of plate*, pawned it to a pawnbroker and died, it was adjudged, That though the pawnbroker had no notice of the property the person pawning had in the thing, that he could have no lien on the plate as *against him in remainder*.

Ex parte Shank.
1 Atk. 234.

4. If a person in England repairs a ship, he has no lien against the body of the ship for the repairs done to her: though for repairs done beyond sea, the master may hypothecate the ship herself.

Wilkins v.
Carmichael.
Doug. 97.

So neither has the master any lien on the ship for any money expended by him in repairs on her in England, or for money due for his own wages; for such contracts are entirely personal.

" But where a person saves goods out of a ship which is in danger, he shall have a lien on the goods for salvage."

Hartford v.
Jones.
1 Ld. Raym.
398.

[584]

As where the ship took fire, and the defendants, at the hazard of their lives, saved the goods; it was held by Chief Justice Holt, That in trover for the goods, the defendants might give in evidence, that they detained them till paid for the salvage.

Robinson v.
Walter.
3 Bulst. 268.
1 Rolle's Rep.
449.

5. An innkeeper hath by law a right to detain an horse left with him till he is paid for his keeping; for as he is by law compellable to receive a guest and his horse, so he shall have this remedy. And though in this case the horse had been brought to the inn by a stranger, without the owner's knowledge, and was afterwards claimed by the owner, yet it was held, That the innkeeper might notwithstanding keep the horse till paid; for so by pretended ignorance that his horse was sent to an inn, might the owner defraud the innkeeper, by getting his keeping for nothing.

York v.
Grindstone.
Salk. 388.

So that to give this right of retainer, it is not therefore necessary that the owner should be a guest; for merely leaving his horse at an inn gives this right of retainer till paid for his keeping to the innkeeper.

Jones v. Pearle.
1 Stra. 557.
Warbrook
v. Griffin.
2 Brownl. 2, 54.

But this power of retaining is only while the horse remains in the innkeeper's possession; for if he suffers the horse to be taken away, and the horse is brought again to his inn, he cannot retain him for the former demand.

Per Ld. Kenyon.
Hunter v.
Barkley.
Sitt. Mich.
32 G. 3. MSS.

And this privilege of retainer is confined to innkeepers; for a livery stable-keeper has no such privilege to detain an horse for his keeping; for it is allowed to innkeepers on the ground of their being obliged to receive guests and their horses;

horses; but that is not the case of livery stable-keepers, who rely on the contract.

So the innkeeper cannot *sell* the horse except in *London*, where, by the custom, he may sell the horse for his keeping; and therefore in this case, where an innkeeper had been in debt to an innkeeper at *Glastenbury* for the keeping of his horses, and he seized and sold three of the carrier's horses, the carrier recovered in this action. Jones v. Pearle. 1 Stra. 557.

So by the customs of *London* and *Exeter*, if an horse at an inn eats out the price of his head, the innkeeper may have a reasonable appraisement of his value made by four of his neighbours, and *take him as his own*, according to that valuation, for his debt. Mofs v. Townsend. Quot. 3 Bulst. 271.

6. So a *carrier* may detain goods entrusted to him to carry, till he is paid for their carriage. Skinner v. Upshaw. 2 Ld. Raym 752.

* But a carrier or warehousenman has no lien on goods for booking or warehouse-room when the goods are taken by the owner from the waggon, and have never been in the warehouse. Lambart v. Robinson. Esplin, Caf. N. P. 119.

7. "An attorney has a lien against the papers, &c. of his client, and may retain them till paid his bill of costs." Per Ld. Mansfield. Dougl. 226.

* But where a *clerk in court* advanced money to a solicitor to carry on a cause, it was adjudged, That *he* could not detain the client's papers as a pledge for the money advanced by him to the solicitor, but should have recourse to the solicitor himself. Grey v. Cockerell. 2 Atk. 114. * [585]

8. "But this right of lien being admitted for the benefit of trade, it shall be confined in its operation to that only."

Therefore where the owner of five cows put them to pasture with the defendant, and agreed to pay him 12*d.* per week for each cow, and afterwards the owner sold them to the plaintiff; it was adjudged, That the defendant could not justify the detaining them *for their keeping*, but was put to his action against the first owner. Chapman v. Allen. Cro. Car. 271.

So if an horse be distrained to compel an appearance in the hundred court; after an appearance, the person who took the horse cannot justify detaining him till *paid for his keeping*. Linton v. Cook. H. 9 G. 2. Bull. N. P. 45.

So where *A.* purchased an interest in a lease, and the writings were left in the hands of an attorney to draw an assignment, which he did, and it was executed; it was held, That he could not refuse to deliver it up to *A.* till paid for it. Anon. 1 Ld. Raym. 733.

So where the defendant paid the duty at the custom-house for a parcel of goods, the property of the plaintiff, which had Stone v. Lingwood. 1 Stra. 651.

had come home in the same ship with other goods of the defendant's; it was held, That he should not retain the goods till paid what he had advanced for the duty; for he might have his action for the money.

This case of *Stone v. Lingwood* has been over-ruled by Lord Mansfield. Vide 4 Burr. 2218.

Binstead v.
Buck.
2 Bl. Rep. 1117.

So where in trover for a dog, the defendant justified the detaining him, on the ground that the dog had strayed casually to his house, where he had kept him twenty weeks, and demanded the expence of his keeping; on a case made, Whether the refusal amounted to a conversion? the defendant's counsel declined to argue it; so the *postea* was ordered to the plaintiff.

Nicholson v.
Chapman.
2 H. Black. 254.

So where a quantity of timber, which had been placed in a dock on the river *Thames*, and the ropes had loosened, in consequence of which the timber floated down the river, and was left by the tide on a towing-path at *Wimbledon*, where it was found by the defendant, and conveyed into a place of safety for the owner; it was adjudged in this case, That the defendant could claim no lien against the timber for the expences of the carriage and removal, &c. of it, but was bound to redeliver it to the owner, though he might perhaps have an action against the owner for the expences so incurred for his benefit.

“ And in general, no person can in any case retain where
“ there is a *special agreement to pay*, for then the other party
“ is personally liable.”

Brenan v.
Currint.
Sayer's Rep.
224.

[586]

For where the defendant, who was a farrier, undertook to cure the plaintiff's mare for a certain sum, he performed the cure, and then refused to deliver her up till paid for her keeping and cure; the plaintiff brought trover for the mare, when it was adjudged, That having *made an agreement* for a certain sum, that he must sue on the agreement; and had no right to retain the mare till he was paid.

Mead v.
Hammond.
1 Stra. 505.

5. Trover will lie against the master for goods which were delivered to the servant.

Jones v. Hart.
Salk. 441.
1 Ld. Raym. 738.
S. C.

But in such case it is not sufficient that the goods were delivered to the servant, unless it appears that the goods came to the hands of the master, or unless the servant was usually employed by the master to receive the goods in the way of the master's trade: as in this case, which was a pawn delivered to a pawnbroker's servant, and which being lost, the pawner recovered in trover against the master.

Perkins v.
Smith.
1 Will. 328.
Ante 580.

So trover will lie against the servant himself for disposing of the goods of another person, though to his master's use, and that whether he had authority from his master to do so or not.

6. One

6. One tenant in common, joint-tenant, or partner, cannot have trover against his companion; for the possession of one is the possession of all.

Brown v. Hedges. Salk. 290. 2 Ref.

Therefore where the plaintiff was a member of an amicable society, and kept the box containing the subscription, which defendant, who was also a member, took away, it was held, That they were tenants in common of the box, and so that one could not maintain trover against the other.

Holliday v. Camfell. 1 T. Rep. 658.

“ But this is only in cases where the property is equal; so that the possession of the one is the possession of the other.”

For where there were two tenants in common of lands, the one in fee, the other for years, and the tenant in fee cut trees, which the tenant for years converted to his own use; it was held, That the other might have trover for them, for they belonged entirely to the inheritance.

West v. Pasmore, at Exon, per Turton, Just. Bull. N. P. 35.

“ So if one tenant in common destroys the thing held in common, the other may have trover against him for it, for that is a total conversion to his own use of what he had only a part.”

Co. Litt. 20c. a.

As where one part-owner of a ship took her and sent her on a voyage to the *West Indies*, where she was lost, and the other owners having brought an action for it, Lord King left it to the jury, Whether, they being tenants in common of the ship, this was not a destruction by the defendant? and the jury found accordingly, and the plaintiff recovered.

Barnardiston v. Chapman & Smith. Hil. 1 G. 1. Bull. N. P. 34. [587]

But otherwise in the case of partners in trade, each has a power singly to dispose of the whole partnership effects, and even if one of the partners becomes a bankrupt, yet every act of the solvent partner without knowledge of the act of bankruptcy, as in making consignments or sales of goods, &c. if done *bonâ fide* and without fraud, is good, so that the assignees of the bankrupt partner cannot recover by this action the goods so disposed of by the other; neither, if the solvent partner afterwards becomes himself a bankrupt, can the assignees, under the joint commission against both, maintain trover against the *bonâ fide* vendee or consignee of the partnership effects.

Fox v. Hanbury. Cowp. 445.

7. Trover will not lie against executors or administrators for a trover and conversion of goods by their testators or intestates; for it is founded on a tort; and actions founded on torts committed by the testator or intestate, cannot lie against executors or administrators.

Hambly v. Trott. Cowp. 375.

8. Trover will lie against *baron and feme* whenever the conversion has been by the wife before coverture, or by herself after coverture; for it being a tort by her, she shall be joined with her husband in the action.

Marsh's case. 1 Leon. 312. Owen. 48. Drape v. Fulkes. Yelv. 165. Sir W. Jones, 147.

3. OF THE PLEADINGS AND EVIDENCE IN THIS ACTION.

I. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1 Danv. Abr.
23.
Bull. N.P. 33.

1. In trover *the conversion is the gist of the action*, and the manner in which the goods come to the defendant's hands is but inducement; the plaintiff may therefore declare upon a *devenerunt ad manus* generally, or specially *per inventionem*, (even though in fact the defendant came to them by delivery,) or that the defendant fraudulently obtained them (as by winning them at cards from the plaintiff's wife); and this being inducement, need not be proved: but it is sufficient to prove property in the plaintiff, the possession of and conversion by the defendant.

Bottomley v.
Harrison.
2 Stra. 809.

[588]

2. It was formerly usual to tie up the plaintiff to great strictness, in specifying in the declaration the nature, quality, and quantity of the goods for which the action was brought; and numberless cases in the old books, of arrests of judgment in trover, turn upon that objection. But greater latitude is now allowed: as a declaration *for one parcel of pack-cloth*, without setting out the exact quantity, has been held to be good; so *for fifty pieces of square timber*.

Per Holt, at
G. Hall, 1707.
Bull. N.P. 37.

Wilson v.
Chambers.
Cro. Car. 262.

Therefore in trover for a *debenture* against the defendant, in whose possession it was, it was ruled, That the plaintiff need not set out *the number* of it, nor in trover for a *bond* need he set out the date; for being out of possession, he might not know the exact number or date: but if he does in his declaration set out the number or date, he *must prove it exactly as laid*, and *the sum to a farthing*, or *he shall be nonsuited*.

1 Brownl. 8.
1 Vent. 135.

3. "The declaration in trover should state *the time* of the conversion; and for want of alleging it, judgment was in "this case arrested."

Tefmond v.
Johnson.
Cro. Jac. 428.

But where the plaintiff in his declaration under a *scil.* laid the conversion on *a day before the finding*, and this was alleged in arrest of judgment, the Court held, nevertheless, that the *postea convertit* was sufficient, and the *scil.* being inconsistent, to be void.

Hubbard's case.
Cro. Eliz. 78.

4. So the declaration should state *a place* where the conversion was made, or the declaration will be ill in substance for want of a venue.

Anon.
Clayt. 131.

But the want of a place is aided if the defendant pleads a special plea, as a sale in market overt, *viz.* at *S.* in *Com. Nott.*; for then a *venue* is laid in the *plea*: but where the plea

plea is so, the proof of a sale in another place in market overt will not support the declaration.

But though a time and place of conversion must be alleged *in the declaration*, yet the action being transitory, the conversion may be laid here, and proved in *Ireland*. Brown v. Hedges. Salk. 290. 1 Ref.

5. The declaration in trover need not allege *the value of the goods*; aliter in detinue, where the goods themselves are to be recovered, or the value of them. Godwin v. Harwood. 2 Roll. Rep.

6. In trover by *baron and feme*, it is bad to declare that the defendant converted the goods *ad damnum ipsorum*, for the possession of the wife is the possession of the husband, and so is the property; the conversion therefore cannot be to the damage of the wife, but of the husband only. Nelthorp & ux. v. Anderson. Salk. 114.

So for the same reasons, in trover *against* baron and feme, the conversion must be laid *to the use of the husband*, and not *to her, or their use*; for she can have no property in things personal during coverture. Berry v. Nevis. Cro. Jac. 661. [589]

7. In declaring in this action by *an executor*, it seems not to be material that the declaration should state the time of the conversion, whether in his own time or in that of his testator, as the executor may in either case well support the action. Eliz. Countess of Rutland v. Isab. Countess of Rutland. Cro. Eliz. 377. 2 Ref.

So as an executor is possessed of his testator's goods, *ut de bonis propriis*, he may declare for them in that manner, and yet that the conversion of them was *in retardationem executionis testamenti*. Rivers v. Godskirt. Cro. Eliz. 563.

8. In trover by *an administrator*, he may declare generally that administration was granted to him by *A. B.* official of the bishop of ———, without saying that he was ordinary of the place, or had the right of granting administrations. Lacy v. Smith. Cro. Eliz. 102.

So an administrator may declare that he was possessed of divers goods and chattels as of his own proper goods; and though they were the testator's in fact, yet the declaration is good. Hudson v. Hudson. Latch. 214.

In trover by an administrator for rum *taken and converted in the lifetime of the intestate*: upon evidence it appeared, that the rum had been taken in the testator's lifetime, but *converted after his death*; and this evidence was held to maintain the declaration; for the time of using the rum lay in the breast of the defendant, who ought to have disclosed it by his plea; and the taking in the intestate's lifetime and keeping it till his death, was sufficient to maintain the declaration. Crozier v. Ogleby. 1 Stra. 691.

I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. "As this action equally lies where the *taking has been tortious*, or where the defendant has *lawfully obtained possession of the plaintiff's goods and afterwards converted them*; what shall be evidence of a conversion, seems in these two cases to be different."

Bruen v. Roc.
Sid. 264.
Beckwith
v. Elvey.
Clayt. 112.

For where an *actual taking of the goods in question* is given in evidence, that is sufficient *without shewing a demand and refusal*, for it is an actual conversion: but when defendant comes to the goods *by finding, delivery, or bailment*, for example, there an actual demand and refusal must be shewn in order to establish a conversion, unless an actual conversion can be proved; in which case it is not necessary to prove a demand, proof of the conversion being sufficient.

[590]

Nixon v.
Jenkins.
2 H. Black. 135.

So where a bankrupt, in contemplation of insolvency, and with a view to defeat his creditors, made a pretended sale of his goods to the defendant, and the assignees brought trover for them, but had neglected to make a demand; they were nonsuited, which the Court refused to set aside. For at the time of the delivery of the goods both parties were able to contract. There was no unlawful taking of the goods; and as the assignees might have affirmed the contract, but in fact had disaffirmed it, they should have demanded the goods.

Eaton v.
Newman.
Cro. Eliz. 495.

But in general, a demand and refusal is sufficient *evidence of a conversion*.

3 Burr. 1423.

Though it is not of itself a conversion; for if the jury find only a special verdict, *viz.* that there was a demand and refusal, the Court cannot adjudge it a conversion.

"A personal demand is not necessary to maintain this action."

Logan v.
Houlditch.
Esplin, N.P. Caf.
22.

For it was in this case ruled by Lord *Kenyon*, at *nisi prius*, that a demand in writing left at the house of the defendant was sufficient.

"For a refusal on demand may be justifiable and lawful under particular circumstances."

Per Coke, Ch.J.
2 Bulst. 312.

As if a person finds my goods, and I demand them; and he answers, that he knows not whether I am the true owner or not, and therefore refuses to deliver them, this is not to be deemed a conversion to his own use, as *he keeps them for the owner*.

Solomon v.
Dawes.
Esplin, N.P. Caf.
83.

So in trover for a box of jewels, the demand was made by the plaintiff's wife. The defendant refused on the grounds that he did not know her. Lord *Kenyon* laid down this general doctrine, That where the defendant refuses to deliver the things on the ground that he does not know to whom they

they belong, and therefore keeps them till that is ascertained; or that the person who applies for them is not properly empowered; or until he is satisfied of the authority of the person applying; in none of these cases is a bare denial evidence of a conversion.

"So where the person has a *lien* in the cases before mentioned, he may lawfully refuse to deliver the things when demanded, till satisfied to the amount of his lien."

As an innkeeper may refuse to deliver an horse standing at a Show. 161. his inn till paid for his keeping.

Or a carrier to deliver goods, till paid for the carriage; these refusals being lawful, cannot amount to a conversion. 2 Lord Raym. 752.

"But a demand and refusal is only presumptive evidence of a refusal; for if it appears that there has been no conversion in fact, this action will not lie."

As in trover against a carrier for goods, *which appear to have been either lost or stolen*, in such case denial is no evidence to support the conversion necessary in this action, since the contrary is proved, though the carrier would be liable under the custom of the realm; but if this did not appear, or if the carrier had the goods in his custody when demanded, it had been good evidence of a conversion. *Vide Ross v. Johnson, ante 580. S. P.* Anbn. Salk. 655. 2Ld. Raym. 752. 5 Burr. 2827.

So if the defendant had cut down the plaintiff's trees, and left them on the ground, this could not support a conversion, since it is plain that they were left in the plaintiff's possession. 2 Mod. 245.

2. A demand of *satisfaction* for goods taken, and a refusal, was in this case adjudged to be sufficient evidence of a conversion, though there was no demand of the goods themselves. *Rookby's case. Clait. 122.*

So where the demand was of *payment* for the goods, of which the defendant had obtained possession, and converted to his own use; and it was objected that a demand of payment was affirming a contract for the sale of the goods, and so should not be good in trover which was founded in a tort. Lord Kenyon ruled it to be sufficient to maintain the action. *Thompson v. Shirley. Espin. N. P. Caf. 31.*

* 3. If the plaintiff proves the goods to have been in his possession, it is *prima facie* evidence of property; but the defendant may prove them to be the goods of J. S. who died intestate, and that letters of administration have been granted to him: but such evidence will not be conclusive against the plaintiff; for he may shew that he was married to J. S. and so entitled. *Blackman's case. Salk. 290. * [591]*

4. In trover by a stranger for goods taken at sea, he must shew, in order to support this action, besides a property in himself, 4 Inst. 154.

himself, first, That his sovereign was in amity with the king of *England*: secondly, That his sovereign was in amity with the sovereign of the defendant; for if there was a war between them, then the capture would be legal.

5. As to the evidence in actions under commissions of bankrupt, it has been decided,

Bateman v. Bailey.
5 T. Rep. 512.
Ewens v. Gould,
per Hardwicke,
Ch. Just.
Hil. 8 Geo. 2.
Buller N. P. 40.
Chapman, Aff.
v. Gardner.
2 H. Black. 279.

1. That a man cannot be a witness to prove an act of bankruptcy committed by himself; but his confession to a third person, at the time that he went out of the way to prevent being arrested, or to such like facts as are acts of bankruptcy, is admissible evidence.

Neither can he be admitted as a witness to prove the petitioning creditor's debt, or any other fact necessary to support the commission, though he has his certificate.

Oxlade v. Perchard & alt.
Sheriffs of London.
Espin. N.P. Caf.
287.
Field v. Curtis.
2 Stra. 829.

But he is an admissible witness to explain a doubtful act which may be or not an act of bankruptcy. As whether an arrest relied on as the act of bankruptcy, on the footing of its being a concerted and fraudulent one, was so or not.

So a verdict upon an issue directed out of chancery to which only one of the defendants was party, may be read against all to prove the time of the act of bankruptcy.

Field v. Curtis.
2 Stra. 829.

So no release can make the bankrupt's wife a witness to prove an act of bankruptcy committed by the husband.

Jourdain & alt.
Aff. Nowlan,
v. Lefevre.
Espin. N.P. Caf.
67.
Hooper v.
Chapman,
Peake N. P. C.
19.

Yet where the bankrupt's wife was called to prove a payment made by her husband in contemplation of bankruptcy, Lord *Kenyon* rather seemed to think she might be admitted.

But a creditor who releases to the assignees is a good witness to prove the act of bankruptcy.

By statute 5 Geo. 2. 30. 41. "The depositions of the witnesses taken before the commissioners, as to the act of bankruptcy, &c. are, upon petition to the chancellor, directed to be recorded, which record shall be evidence of the several matters contained therein, after the death of the witnesses."

Janfon, Aff. of
Burton, v.
Wilfon.
Doug. 244.

Under this statute it was decided, on a question respecting the time when the bankrupt became so, that the depositions so taken before the commissioners, and recorded pursuant to the statute, were good evidence to prove the precise time when the act of bankruptcy was committed; it being proved, that the witness who had proved the act of bankruptcy before the commissioners was dead.

Wilfon v.
Norman.
Espin. N.P. Caf.
334.

2. Where the act of bankruptcy is the absconding to avoid being arrested for a debt, general proof of absconding is sufficient, without shewing any writs to have actually issued.

3. "In

3. "In proving the debt of the petitioning creditor, it must be done by the same evidence which would be required in an action against the bankrupt." Per Buller, Just. Dougl. 206.

Therefore where the petitioning creditor's debt was money due on a bond, and the evidence to prove it was, *that the bankrupt had acknowledged to the witness that he was indebted to the petitioning creditor the amount of the bond, but the subscribing witness was not produced*, it was adjudged to be insufficient, and the plaintiffs were nonsuited; for proof by the subscribing witness is the only legal evidence in an action on the bond. Abbot & alt. Ass. of Farr v. Plumb. Dougl. 205.

However in this case, which was an action of trover by the assignees of a bankrupt to recover goods of the bankrupt, taken by the defendant under a bill of sale given to him by the bankrupt, and which bill was the act of bankruptcy relied on, it was held sufficient proof, to produce the defendant's examination before the commissioners, in which he admitted the execution of the bill of sale, without producing the subscribing witness. Bowles v. Lanworthy. 5 T. Rep. 366.

So in this case, which was trespass on the case against the sheriff for a false return, for the purpose of trying the right of the assignees of a bankrupt to certain goods taken by the defendant under an execution at the suit of another creditor subsequent to the commission; the evidence of the petitioning creditor's debt was, an acknowledgment by the bankrupt to the witness that he was indebted to the petitioning creditor in the sum of 100*l.* and upwards; but this was made on the same day the act of bankruptcy was proved to have been committed. Lord *Kenyon* ruled, That such an acknowledgment made at any time before suing out the commission was sufficient to support it. Dowton & al. v. Crofts. Espin. N.P. Caf. 168.

4. "In actions to recover any part of the bankrupt's property, a creditor is clearly from interest an incompetent witness."

But where, on a motion for a new trial, on the ground that a creditor who had proved a debt under the commission had been admitted to prove the debt of the petitioning creditor at the trial, it appeared that he had *sold his chance of recovering his debt* to another person for less than five shillings in the pound, and had released the assignees, and so in fact had no interest, he was held to be a competent witness to support the commission. Granger v. Furlong. 2 Black. Rep. 1273.

So *the bankrupt* cannot be a witness to swear property in himself, or a debt due to himself without a release of his share of the surplus and the dividends: but he may prove property in or a debt due to another. Ewens v. Gold. Ld. Hardwicke. 8 Geo. 2. Bull. N. P. 43.

For the rule is, That an uncertificated bankrupt may be a witness to diminish the fund which is to pay his creditors, by proving Butler v. Cooke. Cowp. 70.

proving the property out of himself, for so he swears against his own interest; but he cannot be a witness to prove property in himself without a release, for that is to increase the fund, and so he is interested.

Per Ld. Kenyon.
Kennet v.
Greenwollers,
Westm. Sitt.
Hil. 30 G. 3.
MSS.

Therefore where a trader has been *twice a bankrupt*, in an action by the assignees under his second commission he is an incompetent witness, even with a release, *unless he has paid fifteen shillings in the pound*; for he is not merely interested in the surplus and dividends on that commission, but has a farther interest, *viz.* to discharge his future effects, which he does by increasing the fund of his second commission, as his future effects are liable in case he does not pay fifteen shillings in the pound. This objection was taken by the Chief Justice himself at *nisi prius*.

The rule is general, that in all actions by assignees of a bankrupt the plaintiffs must prove the regular steps of trading, petitioning creditor's debt, act of bankruptcy, &c.—However, to this there are exceptions.

Faviland v.
Cook.
5 L. Rep. 655.

As where the action was against the bankrupt himself, and he pleaded his certificate; the plaintiffs relied, that he had been a bankrupt before, and had not paid fifteen shillings in the pound on his second bankruptcy; but to prove the first bankruptcy only produced the commission and the proceedings under it, but did not prove any of the steps abovementioned. On the case coming before the court of K. B. they held, that as against the bankrupt himself it was sufficient evidence.

3. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Devne v.
Dr. Coridon.
1 Keb. 305.

1. It is said by Justice *Twisdal* in this case, that there is no plea in trover but the *general issue*, and the *special one of a release*; for every plea in justification is tantamount.

[593]

But, however, numberless special pleas allowed appear in the books; and Lord Chief Justice *Holt*, in *Salk.* 654, allows this one following to be of that description, though he says, That it is the only good special plea in the books, *viz.*

Kenicot v.
Bogan.
Yelv. 198.

To trover for two pipes of wine, the defendant pleaded, that so much is due to the king out of every twenty pipes of wine imported *for prize*, and for which he took the wine in question; this plea was held to be good.

Parker v.
Norton.
6 T. Rep. 695.

It was in this case attempted to plead bankruptcy in bar of an action of trover for a bill of exchange which had been delivered to the bankrupt, and converted to his own use before his bankruptcy; but on demurrer it was over-ruled.

But

But other special pleas have been allowed.

As where the defendant pleaded, that the plaintiff had had *a judgment in trespass* against him for taking the same goods; it was ruled to be a good plea. Lechmere v. Toplady. Show. 146.

So a recovery in trover for the same goods against J. S. was held to be a good plea. So if the trover had been against the defendant, and the plaintiff had recovered. Brown v. Wooton. Cro. Jac. 73.

For where there is a recovery in trover, as the plaintiff is supposed to get damages to the value of the goods, they then become *the property of the defendant*, so that the plaintiff in neither case has a property in the goods. Adams v. Broughton. 2 Stra. 1078.

“ So that it seems that all these cases of justification may be given in evidence under the general issue.”

As where in trover for taking a gun, the defendant pleaded the general issue, and gave in evidence, that he was game-keeper of the manor of B. and took the gun under stat. 22 & 23 Car. 2. it was held to be well; though as the act does not authorize the pleading the general issue, it would be otherwise in trespass. Dane v. Walter, in Kent, 1682. Bull. N. P. 48.

It will however be proper to mention some cases of good justifications in this action, so as to enable defendants to avail themselves of them for their defence, whether in the form of a plea, or as evidence under the general issue.

1. As where the defendant to an action of trover for ten loads of timber, pleaded “ That he was tenant to the plaintiff, and had erected a barn on the premises, and put it upon blocks and timbers lying upon the ground, but not fixed in it, and which it was the custom of the country so to fix, and carry away at the end of the lessee’s term,” it was held to be a good justification; and the defendant had a verdict. Culling v. Tuffnall. per Treby, C. J. at Hereford, 1694. Bull. N. P. 34.

* So things fixed to the freehold, and set up by the lessee for the convenience of trade (as vats, coppers, tables, &c.) may during the term be removed by the lessee, and are liable to be seized and sold by the sheriff under a *fiery facias*, issued against the lessee who erected them. Poole’s case. Salk. 368. * [594]

For though the general rule of law is, That things fixed to the freehold cannot be removed, yet this has of late years admitted many exceptions, and many things are now allowed to be carried away, which could not formerly; as marble chimney-pieces, &c. and still more, fixtures for the benefit of trade; as brewing vessels, cyder mills, and such like: this is as between landlord and tenant, and tenant for life or in tail, and the reversioner; but the rule still holds as between heir and executor. Bull. N. P. 34.

Harvey v.
Harvey.
1 Stra. 1142.

But in this case, which was trover by the executor against the heir, the Chief Justice held, That *hangings, tapestry, and iron backs to chimnies*, belonged to the executor; who recovered accordingly.

Hamilton v.
Davis.
5 Burr. 2732.

2. In this case the defendant justified the detention of goods *as wreck*, the goods having been cast on shore, and no animal having escaped alive from the wreck, so that they belonged to the grantee of the crown: but it was resolved, That if by any marks, as the initials of the owner's name on casks, *ex gr.* or by any means the property can be traced and clearly made out, that such goods shall not be deemed wreck, but belong to the owner, though nothing living has escaped from the ship.

Palmer v.
Woolley.
Cro. Eliz. 454.
3 Co. 83. S. C.

3. In trover for goods, the defendant justified, "That by prescription, every shop in *London* should be a market overt for all wares sold there, and that the goods were so bought there;" it was adjudged, That the custom was too general and unreasonable; for a sale is only good as in market overt, *where a thing is bought which appertains to the trade of that shop*, as plate at a silversmith's, &c. but not if bought in a back-shop or place not open, or in a shop whose trade is in goods or wares of a different nature from those sold.

Thompson v.
Clark.
Cro. Eliz. 504.

4. In trover for goods, and conversion of them at *D. in com. Nottingham*, the defendant justified, "That he recovered against the plaintiff a debt of 20*l.* by bill in *K. B.* and had thereupon a *fi. fa.* directed to the sheriff of the county of *York*, who at *Wakefield*, in that county, *seized and delivered to him the goods in question*," and so justified the conversion; on demurrer, the plea was held to be ill, because the sheriff *cannot deliver the defendant's goods taken in execution, to the plaintiff* in satisfaction of his debt.

[595]

Gomerfal v.
Wyatt.
Cro. Jac. 255.

5. The defendant in this case justified the taking of the goods as bailiff of the king for a *distress upon a plaint in curia manerii*, and *selling them*; this on demurrer was held to be bad; for the goods taken upon a *distingas* should not be sold, especially in a court-baron, though it were the king's.

6. "Therefore a plea in justification should always shew
" a complete title."

Davies's case.
Cro. Eliz. 611.
Foxley's case.
4 Co. 109.

As where the plea was a justification of the taking, as *waif*; it was held that the plea should state that a felony was committed, and that the goods were waived by the thief, or it is bad. *Brownlow v. Lambert*, Cro. Eliz. 716. S. P.

Agars v. Lisle.
Hutt. 10.

So the plea in justification should either *traverse the conversion, or confess and avoid it*; for the conversion is the gist of the action, and it is not therefore sufficient to justify the taking only.

2. Another plea in this action is *the statute of limitations*: as to which it is enacted, "That actions of trover must be commenced within *six years* after the cause of action accrued, by stat. 21 Jac. 1. c. 16."

1. "This statute begins to run from *the time of the conversion*, for then the cause of action accrues."

For where an executor left furniture of the testator's in the house by consent of the heir, who used it, and afterwards refused to deliver it to the executor when demanded, the executor brought trover for it, and the heir pleaded the statute of limitations; but *per cur.* the user by consent and before demanded was no conversion, and the refusal, which is the only evidence of it, being within six years, the action is not barred.

Wortley Montague v. Lord Sandwich.
Farresley, 99.

2. Where to a plea of the statute of limitations, the plaintiff replies that the action was commenced before the six years expired, he ought to set out *the day when the writ was sued out*; it is not sufficient to say that he sued it out generally in *Easter* term, or so.

Coles v. Sibby.
Style, 178.

And by no fiction of law of reference to the first day of term shall the plaintiff be barred of his action; but he shall always be at liberty to aver the true time of suing out the writ.

Morris v. Harwood & Pugh.
3 Burr. 1243.

3. If one joint-tenant brings trover against a stranger without joining his companion, the defendant should plead * it in abatement; and cannot take advantage of it on the general issue. 2 Lev. 113. Cro. Eliz. 544.

Brown v. Hedges.
Salk. 290.
3 Ref.

* [596]

4. In trover by a rightful administrator against an executor *de son tort*, the defendant cannot give in evidence payment of debts to the value of goods, which are still in his hands, but only for such as he had sold. *Ante*, Anon. 1 Vent. 349.

Cheeshold v. Messenger, per Parker, Ch. Bar. at Gloucester, 1747.
Bull. N. P. 48.

If an administrator brings trover on his own possession, the defendant may give in evidence on the general issue *a will and an executor*; but if the action be brought on the possession of the intestate, the defendant must plead it in abatement, and cannot give it in evidence on the general issue.

Blainfield v. March.
Salk. 285.

5. In some cases the defendant is allowed to bring *the things for which the action is brought into court*.

As in the case of *trover for money*, the Court gave leave to bring the money declared for into court; but the Court said they would do it in this case only, and *not in trover for goods*.

Anon.
1 Stra. 142.

And so it was in this case denied, which was *trover for goods which are cumbrous, and require room*; but the Court granted

Cook v. Holgate.
2 Barnes, 284.

granted a rule to shew cause why on delivery of the goods to the plaintiff and paying of costs, the proceedings should not be stayed.

Fisher v. Prince.
3 Burr. 1364.
Whitten v.
Fuller.
2 Black. Rep.
902.
Carlin v. Catlin.
3 Willf. 23.

And where the *goods* are of an ascertained value, and there is no tort to increase the damages, they may be brought into court.

And *note*, That the defendant in this action may be held to special bail, on an affidavit that the goods converted amount to above 10/.

4. OF THE DAMAGES AND COSTS.

I. OF THE DAMAGES.

Okvant v.
Berino.
1 Willf. 23.

"The judgment in trover can only be for *damages*; for "the Court will not make an order that the plaintiff shall "take back his goods again, for which the action is brought and "costs, and discontinue his action; for the action is not for "the goods, but for damages for the taking and conversion."

Knight v.
Bourne.
Cro. Eliz. 116.

So where in trover for an horse the judgment was, That the plaintiff should recover either the horse or damages, judgment was reversed.

[597]

But, however, where the things for which this action is brought can be restored *in specie*, and undiminished in value, it is usual in practice to restore the goods to the plaintiff the owner, and for the jury then to find nominal damages.

Rivers v.
Godskirt.
Cro. Eliz. 568.
3 Ref.

And the jury cannot assess damages and costs *together* to more than the damages laid in the declaration; but they may assess the damages to that amount, and the costs beyond it to any amount.

2. OF THE COSTS.

1. The statutes which take away costs from the plaintiff do not extend to actions of trover; therefore in it the plaintiff is always entitled to full costs when he recovers.

Marriner v.
Barret.
Pasch. 1 G. 2.
quot.
3 Burr. 1284.

2. The stat. 8 & 9 W. 3. c. 11. which give costs to one defendant who has been acquitted, where there are several (*vid. ante*, chap. of Trespass) does not extend to trover.

CHAPTER XIII.

The Action of Trespass on the Case.

TRESPASS on the Case, is an action brought for the recovery of damages, for acts unaccompanied with force, and which in their consequences only are injurious: for though an act may be in itself lawful, yet if in its effects or consequences it is productive of any injury to another, it subjects the party to this action.

As where the defendant put up a spout on his own premises, this was an act lawful in itself; but when it produced an injury to the plaintiff, by conveying the water into his yard, trespass on the case was adjudged to lie for such consequential injury. Reynolds v. Clarke.
1 Stra. 334.

So shooting of a gun, which in itself is an indifferent and lawful act, yet when by it the plaintiff's decoy was injured, this action was held to lie. Hickeringall's case.
Hil. 5 Ann.

Again where the plaintiff declared *in case*, that the defendant *furiously*, negligently, and improperly drove his cart against the plaintiff's carriage, that it was overturned and broken. This was held ill on demurrer, and that the action should be trespass *vi et armis*. Day v. Edwards.
5 T. Rep. 648.

In treating of this action, I shall first consider the general nature and description of the action: 2d, The particular injuries for which it lies: 3d, The pleadings: 4th, The evidence: and 5th, The verdict, judgment, &c.

1st. OF THE GENERAL NATURE OF THIS ACTION.

1. "It is not necessary to maintain this action, that the injury which the plaintiff has sustained has arisen from some act of the defendant; for the action equally lies where the injury has been caused by the neglect or culpable omission of any duty it was incumbent on the defendant to perform."

As if one retains an attorney to conduct his suit, and in consequence of any neglect the party suffers any loss, this action lies against the attorney for such neglect. Finch's Law,
188.

So if any person suffers his house to be out of repair, and any person suffers an injury in consequence, this action lies. As where it was for suffering some plates or bars which Payne v. Rogers.
2 H. Black. 350.

which covered a cellar occupied by the defendant to be out of repair, in consequence of which the cellar gave way, and the plaintiff fell through a hole in the pavement into the cellar, and was hurt; the action was held to lie against the owner, who was bound to keep the place in repair."

Hale on F. N. B.
427.

* [599]

* So if a person suffers the ditch which borders his neighbour's land to become so foul that the water will not run, whereby his neighbour's land is overflowed, this action lies for such culpable omission of what he was bound by law to do.

" But in order to charge a person in this action for any neglect, the law must have imposed a duty on him, so as to make that neglect culpable."

Mulgrave v.
Ogden.
Cro. Eliz. 219.

As if a person finds any thing, he is under no obligation by law to keep it safely; and if it therefore is spoiled while in his possession, yet no action lies; for there was no duty by law on him to apply any degree of care.

2. It is no excuse for a defendant in this action, that " the injury was *involuntary* on his part; for if any damage is caused to another, *from the folly*, or *want of due care and caution* in such defendant, this action lies."

Michael v.
Aleitree.
2 Lev. 72.

As if a person brings an unruly horse to break in a place of public resort, though he might not intend to do an injury to any person, yet if any one is kicked or otherwise hurt by the horse, he shall have this action: for it was folly and want of care to bring him to such a place for such a purpose.

" So neither is it any excuse for an unlawful act, that by proper attention the person who receives the injury might have avoided it."

Fowler v.
Saunders.
Cro. Jac. 446.

As if a person lays logs of wood across the highway, through which by proper care a person might ride with safety; yet if the horse stumbles over them, and the person be thrown, he may recover in this action for the injury.

3. " But if the injury which the party has sustained has arisen from *his own neglect and folly*, and so might have been avoided, this action will not lie."

Virtue v. Bird.
2 Lev. 196.

As where the plaintiff declared, that he was employed by the defendant to carry a load of timber from *Woodbridge* to *Ipswich*, to be laid down where the defendant should appoint, and that he carried it; when the defendant having appointed no place where it was to have been laid down, that the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled: after a verdict for

for the plaintiff, judgment was arrested; for it was the plaintiff's own fault that he did not take out his horses, and lead them about, or he might have unloaded the timber in any proper place, and have returned.

* " 4. Wherever a right is of a public nature; that is, is common to all the king's subjects, the mere depriving the public of that right, will not subject the party to an action, for so would actions be without end; the remedy is by information or indictment: but if any individual suffers a particular injury in consequence of being deprived of such right, he may have his action on the case." Co. Litt. 56. a. * [600]

As where the plaintiff brought this action against the defendant, as owner of a *common ferry*, to which by prescription the plaintiff as an inhabitant of *Littleport*, had a right to pass *toll-free*, and the action was for refusing to ferry him over, it was held not to lie, for the right of being ferried over was common to all the king's subjects; and for being deprived of that, no remedy lies *without special damage*, which here the plaintiff has not laid; but he might have had his action for *taking toll* from him, he having a particular exemption; but on that he did not declare.

Payne v. Partridge.
1 Salk. 12.

" So where the matter is of a public nature, though confined to a certain body, this action will not lie, without a special injury."

As where the plaintiff declared, that in a certain chapel of ease within the manor of *Wollaston*, the defendant was bound as vicar of *Alderbury*, to celebrate divine service and administer the sacrament to the plaintiff, and his tenants and servants within the said manor; and the action was for the not so celebrating divine service in such chapel of ease: after a verdict for the plaintiff, judgment was arrested; for the chapel being public and common to all the tenants of the manor, then every tenant might have this action, which could not be; but the remedy should be in the spiritual court.

Williams's case.
5 Co. 72. b.

This doctrine was recognized in a modern case of *Hubert v. Groves*, *Essex. N.P. Cas.* 148. which was an action of trespass on the case for obstructing a way, by laying large quantities of earth, &c. on it, whereby plaintiff was prevented from enjoying his premises in as advantageous a manner as he had before done. It appeared that in fact the way was a public one; but that defendant, by laying rubbish, &c. across, had prevented plaintiff, who was a timber merchant, from using it, and had obliged him to carry his timber, &c. by a circuitous way. This the counsel for the plaintiff (on the objection being made that the remedy should have been by indictment) contended was such a special injury as entitled the plaintiff to maintain this action. But Lord

Vide Iveson v. Moore.
1 Salk. 15.

TRESPASS ON THE CASE.

Kenyon held that it was not; and that the doctrine laid down in *Co. Litt.* 56. a. was the true one; and the plaintiff was nonsuited. On a motion for a new trial the Court of K. B. concurred in opinion with his lordship.

Anon.
2 Ld. Raym. 739.
2 Salk. 441. S.C.

5. "It is to be observed on this action, that any person employing another in any office or employment, is answerable for his misconduct or neglect, or for any injury which he may occasion; therefore a master shall answer for the misconduct of his servant."

Jarvis v. Hayes.
2 Stra. 1004.

As where an action was brought against the master, for his servant with his cart having run against the cart of the plaintiff in which was a pipe of wine, which was overturned and spilt, the plaintiff recovered.

Savignac v.
Roome.
6 T. Rep. 125.

But that the master was not answerable for wilful misconduct, as by wilfully driving against plaintiff's carriage, by which it was broken.

"But in the case of injuries, for which the present action is brought, it must be either brought against the master, or against the servant by whose act the mischief has been done; for it will not lie against a steward or manager."

Stone v.
Cartwright.
6 T. Rep. 411.

For where the action was for unskilfully and negligently working a coal-mine under and adjoining to the plaintiff's house, in consequence of which the ground sunk, and the buildings were injured, and was brought against the defendant, who was an agent or manager, appointed under the Court of Chancery (the proprietor being an infant), but who employed a bailiff under him, and hired and dismissed the colliers, but he had no personal interest in the business, was not present when it happened, nor gave any directions for working the mine in the manner by which the accident happened. Lord *Kenyon*, before whom the cause was tried at *Stafford*, nonsuited the plaintiff, holding the above doctrine, which was afterwards confirmed by the Court of King's Bench on a motion for a new trial.

[601] 2. OF THE PARTICULAR INJURIES FOR WHICH THIS ACTION LIES.

These are divisible into injuries, 1. To the person: 2. To personal property: 3. To real property, or chattels real: 4. To personal rights, not properly reducible to any particular head.

Of each of which in their order.

1. OF INJURIES TO THE PERSON.

1 Danv. 77.
Dr. Groenvelt's
case.
2 Ld. Raym.
214.

1. If a person undertakes the cure of any wound or disease, and by neglect or ignorance the party is not cured, or suffers materially in his health, he may recover damages in this action; but

but the person must be a *common surgeon*, or one *who makes public profession of such business*, as surgeon, apothecary, &c. for otherwise it was the plaintiff's own folly to trust to an unskilful person, unless such person expressly undertook the cure.

"And it seems that any deviation from the established mode of practice, shall be deemed sufficient to charge the surgeon, &c. in case of any injury arising to the patient."

For upon this ground an action was adjudged to lie against the surgeon and apothecary, for breaking the callous of the plaintiff's leg after it had been set; it appearing that it was done unskilfully, and out of the common course of practice, and for the sake of making an experiment with a new instrument.

Slater v. Baker
& Stapleton.
2 Will. 359.

2. "If the health of any person is impaired in consequence of the act of another, as selling him bad wine, which injures the party's health, this action will lie; so for exercising a noisome trade in the neighbourhood, which produces the same bad effects."

1 Roll. Ab. 90.

As where the action was brought for erecting a brewhouse and burning sea-coal, by which the air was infected: so for erecting a tallow-furnace, to the annoyance by the smell of the plaintiff's house and family, and loss of business in consequence: in these cases the plaintiff had redress by action on the case.

Jones v. Powell,
Hutt. 135.
Morley v.
Pragnell.
Cro. Car. 510.

3. "If any person keeps a dog which is used to bite, this action will lie against the owner, at the suit of any person whom the dog has bitten."

* But the owner must have notice that the dog was used to bite; for though if a man keeps animals *fera natura*, as lions or bears at large, without proper care, he is answerable for any mischief they do, though without notice, yet dogs being *mansueta natura*, the owner must have notice of their viciousness, or he will not be liable: and it is therefore matter of substance to set out the notice in the declaration.

Mason v.
Keeling.
1 Ld. Raym.
606.

* [602]

Buxenden v.
Sharp.
2 Salk. 662.

Therefore where a dog had once bitten a man, and the owner still let him go at large, though he had notice of the dog's having bitten the person, and he afterwards bit another person, this action was adjudged to lie against the owner of the dog, though it appeared that the person who had received the injury had trod on the dog's toes; for the owner should have hanged him on the first notice, and the king's subjects are not to be endangered.

Smith v. Pelah.
2 Stra. 1264.

"But where the injury from any animal arises from the plaintiff's own misconduct and want of care, the action will not lie against the master."

As

Brook v.
Copeland.
Esp. in. Caf. N. P.
203.

As where in an action for keeping a dog used to bite, it appeared that the defendant, who was a carpenter, had kept a dog for the protection of his yard, which was kept chained up all day, and let loose at night: and it also appeared that the plaintiff had gone into the yard at night after it had been shut up, and the dog loose, and had then received the injury: Lord *Kenyon* ruled that every man had a right to keep a dog for the protection of his property; and that the injury here having arisen from the plaintiff's own fault, in going into the yard after the dog had been properly let loose, the action would not lie,

“ But where there is either a public way, or the owner of a mischievous animal suffers a way over his close to be used as a public one, if he keeps such an animal in his close, he is liable for any injury any person may sustain from such animal.”

A case cited by
Ld. Kenyon in
Brock v. Copeland,
supra.

As where in an action for keeping a mischievous bull that had hurt the plaintiff, it appeared that the plaintiff was going over a field of defendant's in which the bull was kept, and where he had received the injury, it was contended, that the plaintiff having gone there of his own head could not maintain the action; but it also appearing that there was a contest concerning a right of way over this field wherein the bull was kept, and that defendant had permitted several persons to go over it as an open way, it was decided, That plaintiff having gone into the field supposing he had a right to go there, and defendant having permitted it to be used as a legal way, that he should not be permitted to set up in his defence the right of keeping such an animal there as in his own close, and that the action was maintainable.

Bolton v. Banks.
Cro. Car. 254.

So an action will lie against the owner of a dog used to bite sheep, for killing any, after notice to the master.

Kinnion v.
Davis.
Cro. Car. 487.

And it is sufficient to support the *scienter* in this action, that the dog had once done so before.

Jenkins v.
Turner.
1 Ld. Raym.
318.

And if one has a dog used to bite sheep, and he bites an horse, it is actionable; for the owner after notice of the first mischief done, should have destroyed the dog, to prevent further injury.

But these latter cases more properly belong to the head of Injuries to Personal Property.

2. OF INJURIES TO PERSONAL PROPERTY.

Under this head I shall consider, 1. Such injuries as arise to personal property, from the misconduct or negligence of officers: 2d, Of private persons.

Under

Under the class of officers I include, 1. Sheriffs, and their inferior officers: 2. Attornies: 3. Justices of the peace.

1. OF INJURIES BY SHERIFFS, OR THEIR INFERIOR OFFICERS.

Under this head it is previously to be observed,

1. "That as the office of sheriff partakes of a *judicial* as well as a *ministerial* function, wherever the sheriff is acting in his *judicial capacity*, no action will lie for any misconduct in it, where no fraud or corruption appears."

* As where the plaintiff declared against the defendants as sheriffs of *York*, that time out of mind there had been a court of record held before the sheriffs, where actions of debt had used to be brought, and the defendants in such actions arrested, and held to bail by the said sheriffs, and that the sheriffs were also from time immemorial keepers of the gaol; and the action was against the sheriffs for taking insufficient bail; the Court held, that the two authorities concurring, they would hold the act to be done by them as judges, and that the action would not lie.

Metcalfe v. Hodgson & alt. Hutt. 120.

*[603]

2. If there are two sheriffs, and an action is brought against them for any misconduct in their office, and one of them dies before the trial; yet shall the action survive against the other as in other actions of trespass, the *tort* being several as well as joint.

Watson v. Ben- nison & Elswick. Cro. Eliz. 625.

3. "Where a *tort* has been committed by any officer of the sheriff, the party injured may have his action *either* against the sheriff or against the officer (as in the case of a voluntry escape); but where the injury is caused by a *neglect or breach of duty* in any of the officers of the sheriff, the action must be brought against the sheriff himself."

Salk. 18.

As where the action was against the under-sheriff for *embezzling a writ*, this being a *tort*, was adjudged to lie against the under-sheriff.

Marsh v. Astry. Cro. Eliz. 175.

But where it was against the under-sheriff for *not executing a bill of sale to a nominee of the plaintiff's*, of certain goods taken in execution, in pursuance of a promise; this action was held not to lie, it should have been brought against the sheriff as a breach of duty of office; but in fact, the under-sheriff is not bound to make such bill of sale, the legal mode being by writ of *venditioni exponas*, therefore the action would lie in no case.

Cameron v. Reynolds. Cowp. 403.

The principal cases in which this action lies against the sheriff or his officers, may be reduced to four heads.

TRESPASS ON THE CASE.

1. That of escapes: 2. That of rescues: 3. Of improper or informal executions: 4. Of false returns.

And 1st, Of Escapes.

Under this head, I shall consider, 1. What shall be deemed a legal arrest, so as to subject the sheriff and his officers; for unless the arrest is legal, this action will not lie: 2. What shall be deemed an escape: 3. In what cases, and how far the sheriffs shall be liable: 4. What shall excuse him, and how he may have redress.

[604]

1. What shall be deemed a legal Arrest.

Genner v.
Sparks.
1 Salk. 79.

1. *Bare words* will not make an arrest; there must be an *actual touching of the body*, or, what is *tantamount*, a power of taking immediate possession of the body, and the party's submission thereto: and therefore in this case where the bailiff said to the defendant against whom he had the writ, he being then at some distance, that he arrested him by a warrant he had against him; and the defendant having a fork in his hand, kept the bailiff at a distance till he retreated into the house, it was held to be no arrest.

Horner v.
Battyn.
Hil. 12 G. 2.
B. R.
Bull. N. P. 62.

But where a bailiff having a writ against a person, met him on horseback, and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him; but if on the bailiff's saying those words he had fled, it had been no arrest, unless the bailiff had laid hold of him.

Blatch v.
Archer.
Cowp. 64.

2. The arrest must be *by authority of the bailiff, to whom the warrant is directed*; that is, he must be in company, but he need not be the hand that arrests, nor present, nor in the sight of the party arrested: as here where he sent his follower forward, who made the arrest, he being at some distance, and out of sight, the arrest was held to be good.

S. C. Ibid.

3. The arrest by the bailiff must be *by virtue of a warrant signed and sealed by the sheriff*; a verbal authority is not sufficient.

Hodges v.
Marks.
Cro. Jac. 485.

4. The bailiff when he makes the arrest need *not shew his warrant*, nor tell at whose suit the writ is, unless the party demands it: and if the bailiff has two warrants in his pocket, and produces neither, if the prisoner be rescued, either party at whose suit the warrants were, may bring his action and recover.

Semaine's case.
5 Co. 92.

5. It is not lawful *to break open doors* to make an arrest in any case of civil process, for the law will not allow such breach of the peace.

Park v. Evans.
Hob. 62.

Therefore where bailiffs rapt at a door, and on its being opened to see who was there, rushed forcibly in with their
fwords

swords drawn, the entry and arrest were held to be unlawful.

But if the bailiff *finds the outer door open*, and enters peaceably, he may *break open the inner doors* to make an arrest; and this was held so in the present case, where the defendant was a *lodger*, whose room it was contended was his dwelling-house. [605]

Lee v. Gansel.
Cowp. 1.

So where the outer door was a *hatch-door*, the upper part of which was open, but the lower bolted at top and bottom, the officer unbolted the top; and not being able to reach the bottom, *leapt over it*, and unbolted it, and let in the others: it was ruled by Just. *Wilmot*, that this entry was lawful.

Maxwell v.
King. Reading
Lent Aff. 1766.
MSS.

But where in action for breaking and entering plaintiff's house it appeared that the plaintiff's house stood in a stable-yard which was surrounded by a wall, there was a hatch-gate which stood at the foot of the stairs which led to an open gallery from whence there were doors to several apartments, at the top of the stairs there was a door across that part of the gallery which led to the chamber where the plaintiff was; the defendants having got into the yard, broke open the door at the top of the stairs and arrested the plaintiff. Lord *Kenyon* held, that this was the outer door of the plaintiff's dwelling, and that the arrest was illegal.

Hopkins v.
Nightingale &
alt. Esq. N.P.
Cas. 99.

But though a person has been illegally arrested, as here by the bailiff's breaking into the house, yet *if while in such illegal custody he is fairly charged with another arrest*, such last arrest shall be good: but there must be no fraud or collusion, first to arrest the party unlawfully, and then charge him with another action.

Howson v.
Walker.
2 Black. Rep.
823.

6. "By stat. 29 Car. 2. c. 7. § 6. no arrest shall be made "on a *Sunday*, except in case of treason, felony, or breach "of the peace."

An arrest on this day is therefore absolutely void, inasmuch that the party arrested may maintain an action of false imprisonment in consequence of it.

Wilson v.
Tucker.
Salk. 78.

1. But a person may be *retaken on a Sunday* by virtue of an escape-warrant. This is now enacted by statute 5 Ann. c. 9.

Parker v. Sir
Wm. Moor.
Salk. 626.

2. The bail may take their principal on a *Sunday*, and surrender him the next day.

3. But a conviction on a statute, and an order of committal to the house of correction, the party having no goods, is not a criminal proceeding within the statute to allow an arrest on a *Sunday*; but such is void.

Rex v. Myers.
1 T. Rep. 265.

Devenage v.
Dalby.
Doug. 369.

7. The writ to arrest should be within the proper county; for where a person was arrested by a bill of *Middlesex* in another county, the proceedings were set aside for irregularity.

Frost's case.
5 Co. 89.

8. If a person is in custody of the sheriff for one cause, delivering to him a writ against the same person for another cause, is a good arrest; as here, where he was in on a *ca. ad. resp.* delivering a *cap. utlag.* was held good, and to subject the sheriff on an escape.

2. What shall be deemed an Escape.

[606]

Balden v.
Temple.
Hob. 202.

1. "Imprisonment making part of the debtor's punishment, against whom a judgment was had, and who could not pay, if after the defendant had been committed to prison on a *capias ad satisfaciendum* he was seen at large, it was at all times deemed an escape in the sheriff."

For where in debt against the sheriff of *Bucks* for an escape, the escape assigned was, that a person in prison at the suit of the plaintiff was suffered to walk at large through the town, though attended by a keeper, it was adjudged such an escape as subjected the sheriff; and the plaintiff had judgment.

3 Black. Comm.
415.

2. "But to persons taken on *mesne process* only, the sheriff might shew them what indulgence he pleased, provided he had them forthcoming at the return of the writ."

But that is now altered in the case of the warden of the *Fleet*, and the marshal of *K. B.* by stat. 8 & 9 *W. 3. c. 27.* which enacts, "That the warden of the *Fleet*, or marshal of the *King's Bench* prison, suffering any person committed on *mesne process* or execution to go at large, except on *habeas corpus* or rule of court, shall be deemed an escape."

Per Ashhurst, J.
Atkinson v.
Mattinson.
2 T. Rep. 172.

So that still the officer may permit the person arrested to go at large, provided he has him at the return of the writ; but in the case of final process, he cannot for a minute.

Planch v.
Anderson & alt.
Sheriff of London.
5 T. Rep. 37.

If the sheriff has arrested a defendant on *mesne process*, it should seem that he is not obliged to carry him to prison when the return of the writ is out, if the plaintiff is not delayed in his suit; for where the writ was returnable in the eight days of the Purification, under which the defendant was arrested, but he was not carried to prison till the day before the *essoign* day of *Easter* term, when the plaintiff declared against him; it was held, that the sheriff was not liable to an action as for an escape, the jury having found that the plaintiff was not delayed in his suit.

3. By the same statute it is further enacted, "That if the marshall or keeper of any prison shall, after one day's notice in writing, refuse to shew any prisoner in execution to the creditor at whose suit such prisoner was charged, or to his attorney, such refusal shall be deemed an escape."

4. "Where a new sheriff is appointed, his predecessor in office should hand over to him all the prisoners in his custody with their respective executions; and if he omit any, it is an escape, and this should be done by indenture." *Cro. El.* 366. 3 Co. 71.

For where the prisoner, for whose escape this action was brought, had been in the custody of the former sheriffs, *Westby's case.* 3 Co. 71. at the suit of the plaintiff, and also of one Dighton, and in the indenture containing the names, &c. of the prisoners, the execution at the suit of Dighton only was mentioned; and the prisoner escaped; it was adjudged, that the former sheriffs were liable for the escape as to the plaintiff's execution; for being delivered over for one cause, he was out of execution for the other, and so it was an escape immediately in the old sheriffs.

*And if the former sheriff dies, the successor must at his peril take notice of all the persons in custody, and their respective executions; but till a new sheriff is appointed, the under-sheriff is to take charge of the prison, and is made liable by statute 3 Geo. 1. c. 15. But in such case the assignment by the under-sheriff need not be by indenture. S. C. Ibid. * [607]

"But in no case shall the sheriff be liable, except the person who has escaped has been in actual custody; that is, unless legally arrested by his own officers, handed over to him in the goal by the former sheriff, or regularly delivered into custody."

And, 1st, "He must have been legally arrested by the sheriff's own officers."

For where the plaintiff, having taken out a *capias ad satisfaciendum* against the defendants, sent it to Painter, his agent in Cornwall, he applied to the sheriff for a warrant, directed to Painter's own clerk, assigning as a reason for not applying to the under-sheriff, that the under-sheriff was attorney for one of the defendants; the sheriff after some objection, granted a warrant to Rogers, Painter's clerk, who arrested, and suffered the defendant to escape; it was held, that the sheriff was not liable in this case, nor in any case where a special bailiff is appointed on the nomination of the plaintiff himself; for he must take the consequence of all his acts, particularly as by such means the sheriff might be charged either by their fraud or neglect. De Moranda v. Dunkin. 4 T. Rep. 120.

2. "Or he must be handed over in gaol by the former sheriff."

Dawbridge-
court's case.
Cro. Eliz. 366.

For where the old sheriff had a person in custody *in a private house*, and would there have assigned him over to the new sheriff, who refused to accept him, and the prisoner escaped, it was adjudged to be an escape in the old sheriffs, but not in the new; *for the prisoners can only be assigned in the common gaol.*

3. "Or he must be regularly delivered into custody, in order to subject the officer to an escape."

Watson v. Sut-
ton.
Salk. 272.

For where the prisoner was out on bail, and came and surrendered himself in discharge of his bail, by entering a *reddidit se* in the judge's book, the plaintiff's attorney accepted him in execution, and filed a *committitur* with the officer, and afterwards the prisoner escaped: this action was held not to lie against the marshal, for he *was not chargeable without notice*, which should be done either by serving him with a rule or entering a *committitur* also in his book.

Boothman v.
Lord Surry.
2 T. Rep. 5.
Boyton's case.
3 Co. 42.

* [608]

Wilkinson v.
Salter & al.
Cas. temp.
Hard. 311.

*5. Where the bailiff of a liberty, having return of writs and execution on them, *brings a prisoner taken in execution out of his liberty to lodge him in the county gaol*, it is an escape, and shall subject the bailiff.

6. Where the sheriff appointed a prisoner turnkey of the prison, it was held to be a voluntary escape.

3. In what Cases and how far the Sheriff is liable.

1. By stat. 8 & 9 W. 3. c. 27. s. 9. "If any person, desiring to charge another with any action or execution, shall desire to be informed by the keeper of any prison, whether such person is a prisoner there or not, the keeper shall give a true note in writing to such person or his attorney, under the penalty of 50*l.*; and such note, acknowledging the person to be there, shall be sufficient evidence that such person is in actual custody."

Jackson v.
Humphrys.
Salk. 274.

When a person is acknowledged to be in actual custody, *delivering a writ to the sheriff against such person is an arrest in law*, and will subject the sheriff or officer in case of an escape.

2. "The sheriff is only answerable for an escape from himself, or from some of his officers."

Mayor and Bur-
gesses of Wind-
sor's case.
Cro. Eliz. 26.
Ante, fol. 607.
S. P.

For where a *ca. sa.* was awarded to the sheriff of Berks to take the body of J. S., who was *then in custody of the mayor and burgesses of Windsor*, and it being a liberty, he made his mandate out, directed to them as bailiffs of the liberty; afterwards J. S. escaped, and the action was adjudged to lie

lie not against the sheriff, but against the mayor, &c., *they not being officers of his.*

3. If the defendant is in custody of the sheriff, taken under a *capias utlag. on an outlawry* on mesne process, yet if the sheriff suffers him to escape, this action will lie; for though in fact the party is in custody at the suit of the king, and the plaintiff has no interest in his body, yet as the outlawry will not be reversed without security given to appear to a new original, his escape is an injury to the plaintiff; and so the action lies.

Bonner v. Stokely.
Cro. Eliz. 652.
Cook qui tam v. Champneys.
2 Stra. 901.
Sercole v. Hanson.
1 Will. 3.

4. "A distinction is to be observed between process which is *void*, and which is *erroneous*."

"For where the process is void, no action will lie against the sheriff for an escape; but it will where the process has been erroneous, or irregular only."

*The sheriff in this case had the defendant in custody on a *ca. sa. which had issued after the year and day without a scire facias*, and the defendant escaped, the sheriff was held to be liable, and that he could not take advantage of this irregularity; but it had been otherwise had the arrest been made on a *cap. ad respond. tested of Trinity*, and returnable the Hilary term following; for such process must be returnable from term to term, or it is out of court.

Shirley v. Wright.
Salk. 273.
Bushe's case.
Cro. Eliz. 188.
S. P.

*[609]

So where the arrest is founded on a *void judgment*, the plaintiff cannot recover for an escape; but it is otherwise where the judgment is only *erroneous*.

Gold v. Strode.
Carth. 148.

"And wherever the Court which gives the judgment has jurisdiction, the judgment may be erroneous, but is not void; but if the Court has no jurisdiction, the judgment is void."

Ibid.

Therefore where a *ca. sa.* was executed on a judgment of an inferior court, in debt on a bond made *extra jurisdictionem*, and the defendant had escaped, the Court held that an action would not lie against the sheriff.

Anon.
March 8.

And the reason why the sheriff is charged in one case and not in the other is, *that though the process is erroneous*, yet the sheriff *may justify* under it in an action for false imprisonment; and as he may therefore protect himself by such means, he shall be charged.

Therefore on a recognizance in chancery, conusee having sued execution by *ca. sa.* under which conusor was arrested and escaped, it was adjudged, That though the *ca. sa.* was erroneously awarded, yet that while it continued unreversed it was a good execution for the party, and the sheriff was liable.

Coniers Sheriff of Durham's case.
Cro. Eliz. 576.
Weaver v. Clifford,
Cro. Jac. 31.

2. How far the Sheriff is liable.

Br. Ab. 19.
2 Inst. 382.
Petty v. North.
Cro. Eliz. 17.
2 Stra. 373.

Trespass on the case lies in cases of escapes on *mesne process* in which the debt or damages not being ascertained, the plaintiff recovers in this action *damages* for losing the benefit of his action, which are uncertain; but where the party has been in custody *in execution*, wherein the debt and damages are liquidated, there, under the stat. *West. 2.* and *1 Rich. c. 12.* the whole are recoverable *in an action of debt*, with this exception, that where the plaintiff had execution on a statute of lands, goods, and body, and the prisoner escaped, as the lands remained in execution, debt would not lie, but trespass on the case.

“In escapes, therefore, on *mesne process* the matter turns on, whether in fact the plaintiff has been delayed in his suit or not: for if he has not, and it is so found by the jury, no action whatever will lie.”

Flanch v. Anderson.
2 T. Rep. 37.

As in this case, *ante* 606, where the defendant was arrested, on *mesne process*, but kept in custody after the return of the writ, and then carried to prison; and the jury found, that the plaintiff was not thereby prejudiced or delayed in his action. It was resolved that the plaintiff had no cause of action.

Bonafous v. Walker.
2 T. Rep. 126.
1 Ref.

* [610]

And if the party proceeds by action of debt against the sheriff or gaoler for an escape, the jury *cannot give a less sum than the creditor would have recovered against the prisoner*; that is, the sum indorsed on the writ, and the legal fees of execution.

Reading v. Edwin & Fleet.
Carth. 145.

And note, That if the party escapes out of one of the counters, the action shall be brought against both sheriffs; not against him only from whose counter the escape was made, for the two persons make but one sheriff.

4. What shall excuse the Sheriff, and how he shall have Redrefs.

1. “The first case I shall consider in which the sheriff shall be excused for an escape, is the case of *rescous*.”

May v. Proby.
Cro. Jac. 419.

If the sheriff arrests a person on *mesne process*, and he is rescued in going to gaol, the sheriff is not liable; for as the sheriff if he meets the party against whom he has such process, is bound to arrest him, if pointed out to him, and so he cannot be supposed to have the *posse comitatus* then with him: *in all cases of mesne process*, on the same principle, in *cases of rescue he shall be excused*.

Sir William
Clarke's case.
Cro. Eliz. 873.

1 Roll. Ab. 808.
Southcote's case.
4 Co. 84. a.
1 Roll. *ibid*.

But if such person be *once within the walls of the prison* after such arrest on *mesne process*, the sheriff shall in all cases

be

be liable, except where the rescue is by the king's enemies, or the escape by reason of fire: but if a party of *rebels or traitors* breaks the prison and lets the prisoners at large, the sheriff is liable on this ground, that he may always command the *posse comitatus*, and no power shall be presumed greater than that, except common enemies; besides, he may have remedy against traitors or rebels by law, but not against common enemies.

Year B. 33.
H. 6. 1.
Elliott v. Duke
of Norfolk.
4 T. Rep. 729.

And the law is the same in the case of arrests on final process.

"For wherever the sheriff has time to prepare the *posse comitatus*, he shall be liable in case of a rescue."

Therefore where the sheriff was ordered to bring up the body in custody on mesne process, by *habeas corpus*, and defendant was rescued in going to court, the sheriff was held to be liable; for the sheriff having had notice when the body was to be brought up, he might have provided against a rescue by assembling the *posse comitatus*.

Crompton v.
Ward.
2 Stra. 482.

"And in the case of a rescue, the party at whose suit the arrest was made may maintain his action either against the sheriff or against the rescuers. If, therefore, he elects to proceed against the rescuers, it should seem that the sheriff was discharged."

Mynn v.
Coughton.
Cro. Car. 109.
Congham's case.
Hutt. 98.

2. "A second ground of excuse for the sheriff, in case of an escape, is a *recaption upon a fresh suit*. [611]

But 1st. In the case of *voluntary escapes*, the gaoler cannot retake the prisoner; but the plaintiff may by an escape-warrant, and proceed against him to judgment, or against the gaoler. This is in the case of mesne process.

5 Co. 52 b.
Per Wilmot.
C. J.
2 Will. 295.

For all writs of mesne process must be returnable in the same or next term; and if a term is omitted, the writ is void, for so the defendant might be kept unreasonably long in prison: But writs of final process need not be returnable the next term; for the cause is at an end, and the party has no day in court.

Shirley v.
Wright.
2 Salk. 70a.

But if the party so suffered to escape was in execution, the plaintiff may retake him after the twelvemonth without a *scire facias*, for he is in on the first execution.

Lenthall v.
Gardiner.
Hil. 26 Car. 2.
Bull. N. P. 69.

And this though the plaintiff had recovered in an action against the gaoler, if the sum recovered was less than the debt.

Collop v.
Brandley.
Trin. 31.
Car. 2.
Bull. N. P. 69.

But in the case of *negligent escapes*, the gaoler may at any time retake the prisoner; though if the defendant escapes out of prison, and the plaintiff sends a discharge while he

Willing v. Goad
2 Stra 9c2.

is

is so at large, the gaoler cannot justify *retaking him for his fees*.

Ridgeway's
case.
3 Co. 52.

2. The prisoner must be taken *on fresh suit* to excuse the sheriff; and though *he may have been out of sight*, (as in this case, for a day and a night,) yet may the recaption be deemed fresh suit, and the sheriff be excused; and though the prisoner might have fled into another county, yet may the sheriff there retake him on a fresh suit.

Whiting v.
Sir J. Reynell.
Cro. Eliz. 657.
Stonehouse v.
Mullins.
2 Stra. 873.

But the recaption must be before action brought, or it shall not be deemed fresh suit; for where it appeared that the recaption was not till after the action had been commenced, the marshal was held to be liable for the escape from his prison.

Bail v. Briggs.
1 Jones 145.

And in this case the recaption was on the *same day* of commencing the action, and the officer was held not to be discharged, the action being attached in the plaintiff.

Chambers v.
Gambier.
Com. Rep. 554.
2 T. Rep. 126.

So if the escape was involuntary, and the party returns of himself before action brought, and is in prison, it shall excuse the officer; for it is tantamount to a recaption on fresh suit.

[612]

3. "In general, to charge the sheriff or his officers with an escape, it must have proceeded either from connivance, from neglect, or want of due care, and therefore in all cases where the sheriff or his officers are acting under proper authority, and an escape happens, he is excused."

Vaſt v. Gaudy.
Cro. Eliz. 5.

Therefore where in an action for an escape against the marshal, he gave in evidence that the person in prison had been *let out to bail by order of the Court*, to prosecute the attaint; it was held a good justification; for it was not done out of his own head, but by command of the justices.

Bonaſous v.
Walker.
2 T. Rep. 126.

An escape of a prisoner in the custody of the marshal, *from the rules of the King's Bench Prison*, is a negligent and not a voluntary escape; for by stat. 8 & 9 W. 3. c. 27. The marshal has a right to permit a prisoner to go within the rules.

4. "As in the case of voluntary escapes, the action lies, *against the officer permitting it*, the sheriff seems thereby to be discharged if the party proceeds against the officer."

Ravenſcroft v.
Eyles.
2 Will. 294.

And wherever the gaoler suffers a voluntary escape, from that moment he is a wrong-doer, and though the *original defendant returns*, and the plaintiff proceeds against him to judgment after his return, yet it is no waiver of the action against the gaoler; but he may still be sued for damages.

5. "And in the case of a voluntary escape, no subsequent assent of the plaintiff in the action shall purge it."

For

For where to a *sci. fa. quare executio non*, &c. upon a judgment, the defendant pleaded, that he had formerly been taken in execution on a *ca. fa.* upon the same judgment, and by the sheriff suffered to escape, *to which escape the plaintiff consented*; it was held no plea, for the subsequent assent could not make it an escape with the consent of the plaintiff; but that he may either sue the sheriff or retake the party.

Scott v. Peacock.
Salk. 271.

2. How far the Sheriff shall have Redress.

1. If the party in custody, on execution or otherwise, escapes, the sheriff may have an action of trespass on the case *against him*, for the sheriff is liable over to the plaintiff in the first action.

Sulston and
Offley v. Paine.
Cro. Eliz. 234.

So in an action against a prisoner for an escape, Just. Yates ruled, That if a sheriff voluntarily permits a prisoner to escape, and he in consequence is obliged to pay the debt, he may maintain an action for money paid, laid out, and expended against the defendant, for he is discharged as against the plaintiff in the action; and he said that the same point had been so ruled by himself and Just. Gould on the western circuit.

Morris v.
Berkeley.
Worcester Lent
Ass. 2765. MSS.

* And this action is maintainable by the sheriff against the person escaping, *though he himself has not been sued on the escape*: For the party arrested did a wrong by the escape, and the sheriff is always liable to the plaintiff in the original action: and perhaps the person escaping might die, or leave the country before the sheriff was sued, and so he would lose his remedy.

Sheriffs of Nor-
wich v. Brad-
shaw.
Cro. Eliz. 53.
*[613]

2. But the *bailiff* who made the arrest, and from whom an escape has been made, *cannot have case against the person escaping*, even though the sheriff has recovered against him; for he is not chargeable to the sheriff *by law*, but upon his own undertaking; and therefore as no responsibility is by law annexed to his office, the law gives him no remedy, as the wrong was not done to him but *to the sheriff*.

Atherton v.
Harward.
Cro. Eliz. 349.

Having considered the cases of escapes and rescues, I shall now consider those on improper and informal executions.

3. Of Improper or Informal Executions.

1. By statute 8 Ann. c. 14. § 1. "No goods or chattels whatever, lying or being on any premises leased for life, years, or at will, shall be liable to be taken in execution, unless the party at whose suit the execution or extent is sued out, before the removal of the goods, shall pay to the landlord or his bailiff all such sums of money as are or shall be due for the rent of the said premises at

" the time of the taking in execution, provided the arrears
 " do not amount to one year's rent; and in case the amount
 " exceed one year's rent, then the party at whose suit the
 " execution is, paying the landlord or his bailiff one year's
 " rent, may proceed in the execution, and the sheriff or other
 " officer is empowered to levy the money so paid for rent as
 " well as the execution, and pay it over to the plaintiff."

Palgrave v.
 Windham.
 1 Stra. 212.
 2 Willf. 141.

If therefore the sheriff takes goods in execution, and removes them off the premises before the landlord has been satisfied for the year's rent, (*he having got notice that the rent was due,*) an action on the case lies against him, either at the suit of the landlord himself, or, in case he is dead, of his executor or administrator, it being an injury to the estate.

But these decisions are to be observed :

S. C. *ibid.*

1. That the payment must be made by the plaintiff in the action; and the sheriff should not proceed in the execution till the rent is paid; for so are the words of the statute.

Gore v. Goston.
 1 Str. 643.

2. The landlord must be paid *his whole year's rent*; that is, without deduction of poundage for sheriff's fees.

3. " The statute extends only to the case of *the immediate lessor* of the defendant."

Case of James
 Bennet, Esq.
 2 Str. 787.

[614]

For where the lessee had under-let, and the under-lessee's goods were taken in execution, the Court held, that the ground-landlord (that is, the first lessor) had no claim under the statute to one year's rent, as against the estate of the *under-lessee*, but that it was confined only to his lessor, who was the original lessee.

4. " The statute extends to all cases of execution by *fi. fa.*,"

Henchett v.
 Kempson.
 2 Willf. 140.

For where the *defendant* had judgment as in case of a non-suit, and took out a *fi. fa.* for his costs, it was adjudged, that the landlord should be paid his rent before the execution was served, though it was contested, that the statute only extended to cases of executions taken out *by the plaintiff*.

5. " But the sheriff must in all cases *have notice* of the rent " being in arrear, or he is not liable after he has levied the " money."

Waring v.
 Dewberry.
 1 Stra. 92.

For where the lessee was in arrear of rent, and the lessor died, and before administration granted a *fi. fa.* issued, and was executed by the sheriff on the goods of the lessee; and afterwards administration was granted, it was adjudged, that as there was no one to whom payment of the rent could be made when the execution was levied, and the sheriff was not obliged to retain, the administrator was without remedy, and particularly as the notice of rent-arrear ought to come from the landlord.

But

But in these cases, if the sheriff has levied the goods, the landlord may avoid an action, by getting a rule of court on the sheriff to pay him out of the money levied. 2 Will. 141.

2. "Another case in which the sheriff is liable to an action under this head is this :"

If two writs of the same *teste* came to the hands of the sheriff, he should by common law execute that first which is first delivered, the goods being bound *from the teste*. But by the statute of frauds, the goods are bound *from the day of delivery*, and so priority of delivery is an advantage. Therefore now, whatever be the *teste*, the first delivered ought to have the priority of execution: and therefore, if two writs of *fi. facias* both come to the sheriff on the same day, that which is first delivered must be first executed. If therefore the sheriff executes the last delivered *fi. fa.* first, it is an injury to the plaintiff in the first *fi. fa.* and he may have this action of trespass on the case against the sheriff; but the execution of the second *fi. fa.* is good.

Smallcombe v.
Buckingham.
Salk. 320.

"But in order to charge the sheriff, the first execution must be *bonâ fide*."

*For where in an action against the sheriff, the case was that a *fi. fa.* had issued, directed to the defendant at the suit of the plaintiff, against one *Crop*; one *Whitehall* was made special bailiff, and the warrant was made out to him and two others. *Swanton*, the plaintiff's attorney, was present at the execution of it, and said to *Whitehall* to use *Crop* kindly, and not to take his household goods, for that his landlord, one *Earl*, would soon be in the country, and would pay the debts: upon this the bailiff rode round the land, and said "I seize all this corn and cattle;" and took some account thereof for the use of the plaintiff. This *fi. fa.* was tested the 11th of *May*, and executed the 14th in the manner mentioned. On the 20th of *May*, *Earl*, *Crop*'s landlord, to whom he was indebted upon a judgment, sued out a *fi. fa.* against him; and the sheriff's bailiffs not being in possession of *Crop*'s goods, nor having left any body there, *Earl* got his execution executed, and there was no proof that *Earl* promised to pay the plaintiff. In an action against the sheriff, it was decided, that it was proper evidence to be left to the jury, Whether the first execution that came into *Crop*'s house was intended to be, or really was executed, and not fraudulent? The jury having found it to be so, the defendant had judgment.

Bradley v.
Windham.
1 Will. 44.
* [615]

3. But where two writs come to the sheriff, if he executes the last delivered first, and levies under it, such sale shall be good as well to the vendee, who shall hold the goods, as to the plaintiff in that writ who shall not be liable to refund the

Rybot v.
Peckham.
Mich. 19 Geo. 2.
quot. 1 T.R. 791.

the money levied ; but the sheriff shall be liable to the plaintiff in the first execution, who had lost the benefit of his execution against the defendant.

Hutchinson v.
Johnston.
1 T. Rep. 729.

But where two writs are so delivered, if the sheriff has seized under the second writ, *but not actually sold* ; or if he permits the plaintiff under the second execution to sell, *but with a reservation of the first execution*, in such case the plaintiff under the second execution is not entitled to hold the money levied against the plaintiff in the first.

The last class of injuries for which this action lies against the sheriff or other officers, is that of

4. False Returns.

Griffith v.
Walker.
1 Wils. 336.

1. As where a sheriff returned "*scire feci*" to a *scire facias*, when in fact he had given no notice, this action was adjudged to lie ; and that it might be laid in the county where the return was made, and not confined to the sheriff's own county.

Powell v. Hord.
1 Stra. 650.
* [616]

*So where the sheriff made a false return of *non est inventus* to a writ of mesne process.

Hawkins v.
Mildmay.
Cro. Eliz. 729.

So where the sheriff had directed his warrant to the bailiff of a liberty to arrest the party, he made the arrest, and yet the sheriff returned *non est inventus*, and this action was adjudged to lie.

" But where a sheriff is called on to return a writ in which
" the property of the goods may come in question, he may
" inquire how the property is circumstanced, and make his
" return accordingly."

Croftley v. Ark-
wright.
2 T. Rep. 603.

For where in an action against the defendant, the sheriff of *Derbyshire*, for a false return, the case was, That a writ of *fi. fa.* issued against the goods of one *Clarke*, certain goods were seized which appeared to be the property of *Clarke* ; but it appeared that he claimed them under deed of assignment from one *Allanfon*, who being indebted to *Clarke* in 400l. in consideration of 20l. more advanced, and of an annuity of 25l. *per ann.* for his life, *Allanfon* had assigned all the goods in question to *Clarke* ; but *this annuity-deed had never been registered*, and therefore was void under stat. 17 Geo. 3. c. 26. the sheriff had returned *nulla bona* : it was adjudged, that the deed being void for want of being registered, that *Clarke had no property under the assignment*, and that therefore the return was right.

Sir W. Clarke's
case.
Cro. Eliz. 873.

2. It seemed the better opinion in this case, that if the sheriff makes no return to a writ, that this action will lie.

3. The *executor* may maintain this action for a *false return in vita testatoris*, but this in the case of *final* only, not in the case of *mesne* process (as where upon a *fi. fa.* the sheriff returned that he had levied a part, whereas in fact he had levied the whole); for by the levying of the goods a right vested in testator, and so in the executor, as part of testator's estate; but in the case of *mesne* process, it is a tort which dies with the testator, no property having vested.

Williams v.
Grey.
Salk. 12.

4. It is necessary to observe, that some returns are void, though no action will lie on them, they not being false.

As where the return was "*nulla bona*," and made *before the return-day* of the writ, it is void; for though the defendant may have no goods *at the time*, yet he may at the time of the return.

Palmer v.
Potter.
Cro. Eliz. 512.

So where the return was that the defendant was attached *per catalla ad valentiam* 10l. this was adjudged a void return, for the return should set out *what the cattle were*, so that they might be forfeited, but upon such a general return of them could be forfeited.

Lawrence v.
Netherfole.
Cro. Eliz. 13.

[617]

5. But by stat. 21 Geo. 2. c. 37. s. 2. "No sheriff shall be called upon to make any return to any writ, unless required so to do it within *six months after the expiration of his office*."

1. The six months are to be *lunar* months.

Rex v. Adderley.

2. The day the sheriff is superseded, or goes out of office, is the first day, and reckoned inclusive.

Doug. 446.
S. C.

3. But a mere request to the sheriff to return the writ is not sufficient; he must be required to make the return *by rule of court*, or he shall not be liable.

Rex v. Jones.
Trin. 27 G. 3.
2 T. Rep. 1.

2. OF INJURIES BY ATTORNIES.

1. "If in consequence of any neglect, mismanagement, or corruption of the attorney, the client suffers any loss either in his suit or otherwise, he shall recover damages in this action."

As where the defendant was attorney to the plaintiff in a cause wherein the plaintiff had a verdict, and the defendant in that action having been surrendered in discharge of his bail, the attorney *neglected to charge him in execution*, whereby he was discharged, the action was held well to lie against the attorney for such neglect.

Russell v. Palmer.
2 Will. 325.

"But the damages in this action must not necessarily be to the full amount of the first judgment, and therefore

"fore

"fore the remedy must be by this action, not in a summary way."

Pitt v. Yalden.
4 Burr. 2060.

For where in debt, the party was arrested by the defendant who was plaintiff's attorney; but he having neglected to declare against him in two terms, the party was discharged on common bail. The plaintiff applied for an order of Court on the attorney, to pay the whole debt; but it was refused: the Court saying, that the plaintiff should bring his action regularly against the attorney: for, if the defendant in the first action was in solvent circumstances, the plaintiff might still recover against him, so that the whole sum should not necessarily go in damages against the attorney.

Anon. Salk. 86.

2. Where an attorney takes upon him to appear for another, the Court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him.

[618]

3. "But the remedy for injuries by this action is not confined to the case of attorney and client: for if, in the conduct of a suit against any person, an attorney is guilty of any dishonest or unwarrantable practices, he is subject to this action at the suit of the party grieved."

Knight v. Cop-
ping.
Hutt. 135.

For where the plaintiff had been sued by one Loft, to whom the present defendant was attorney, which suit had been non prossed and costs assessed; yet the defendant having knowledge of this, had unduly and maliciously procured a judgment to be signed against the plaintiff, at the suit of Loft, and taken out execution, under which the plaintiff had been imprisoned until delivered by writ of superseas, the action was held well to lie.

But this case falls more properly under the head Malicious Prosecution. *Quod vid. Plenius.*

3. OF INJURIES BY JUSTICES OF PEACE.

For any breach or neglect of whose duty of office, this action lies against them.

2 Hawk P. C.
90. 14 H. 7.
7 H. 19. Hale
P. C. 97.

1. As if a justice of peace denies, refuses, or obstructs bail where it ought to be granted, for such conduct he is liable to an action on the case.

Green v. Hun-
dred of Buccleff-
church.
3 Leon. 323.

2. So where the plaintiff was robbed, and he went to a justice of peace to take his depositions for the purpose of charging the hundred, which the justice refused to take, whereby the action against the hundred was lost; this action was adjudged to lie against the justice.

2. OF INJURIES BY PRIVATE PERSONS.

These are divisible into two heads, 1. To injuries where there has been a trust: 2. Where there has been no trust.

1. Of Injuries where there has been a Trust.

These form the head of *Bailment*.

Bailment is of six kinds.

1. "The first is a naked bailment, to keep for the use of the bailor, without any profit to the bailee: in this case the bailee is not chargeable, *except in case of gross negligence*; mere want of care is not sufficient." 2 Ld. Raym. 903. Com. Rep. 134.

As where the plaintiff, who was owner of a cartoon, left it with the defendant, who was an auctioneer, without any agreement to take care of it or re-deliver it safe, or without any agreement for a reward, and the cartoon was spoiled; for which the plaintiff brought this action, when it was adjudged on a motion for a new trial, that it was proper evidence to be left to a jury, Whether the defendant had been guilty of any gross neglect in the keeping of it, for such alone should charge him? and the jury found for the plaintiff on that ground. Mytton v. Cock. 2 Stra. 1099. [619]

So where the defendant, who was a general merchant, being about to export a quantity of leather cut out, the bankrupt applied to him to enter a parcel of the same leather at the custom-house for exportation to the same place; but the defendant was to derive no manner of advantage from it, *but did it merely gratuitously*; the plaintiff entered his own and the other's goods at the custom-house, *but by a wrong denomination*; in consequence of which both parcels were seized, and this action was brought by the assignees to recover damages for the neglect: but it was resolved, That the defendant having undertaken gratuitously to act for the defendant, not being to receive any reward, nor being in a situation which necessarily imported skill in that business which he so undertook for the other, and *having taken the same care which he had done of his own*, that he was not liable to an action for the loss of them. Shields aff. of Goodwin v. Blackburn. H. Black. Rep. 158.

2. "The second kind of bailment is, the entrusting of goods to be carried for hire or reward, in which case the bailee is chargeable for any loss: this is the case of carriers."

1. At common law, a carrier is liable by the custom of the realm to make good all losses of goods entrusted to him to carry, except such losses are arise from the act of God or of the Co. Litt. 89. Coggs v. Barnard, 2 Lord Raym. 909, in which

case this doctrine is examined at great length.

Lane v. Cotton.
1 Salk. 143.

the king's enemies : to which may be added, such as arise from the default of the party sending them.

As if a carrier is *robbed*, he shall be liable for the loss, not on the ground that he may charge the hundred under the statute of *Winchester*, but because, that if it was otherwise, he might by collusion procure himself to be robbed, and defraud the owner of the goods ; and so in other cases where the grounds are the same.

But 1. *The act of God* shall excuse the carrier.

Amies v. Stephens.
1 Stra. 128.

[620]

As where the defendant's hoy, having goods of the plaintiff on board, in coming through the bridge, was by a sudden gust of wind driven against the arch and sunk ; the owner of the hoy was held not to be liable, the damage having been occasioned by the act of God, which no care of the defendant's could provide against or foresee : and though in this case the plaintiff gave in evidence, that if the vessel had been better she would not have sunk in consequence of the stroke, Chief Justice Pratt held, That a carrier was not obliged to provide a new carriage for every journey ; it is sufficient if he provide one which, without any extraordinary accident, will perform the journey.

Graves v. Barge.
1 Roll. Rep. 79.

And upon this ground of its being the act of God, if a bargeman in a tempest, for the safety of the lives of his passengers, throws overboard any trunks or packages of value, he is not liable for the loss.

“ But if the carrier of his own accord goes into dangers, from which a loss is likely to accrue, the act of God shall not excuse him.”

As in the case of *Amies v. Stephens* (ante fol. 619.), where was further held, That if the hoyman had gone to sea voluntarily in bad weather, so that there was a probability of his ship being lost, that he would not have been excused.

“ But it must fully appear that the loss was occasioned by the act of God, in order to excuse the carrier's presumption : that it might so have happened will not be sufficient.”

Forward v. Pittard.
1 T. Rep. 27.

For where the defendant, who was a carrier, having lodged his waggon in an inn, an accidental fire broke out, which consumed it ; he was adjudged to be liable, though it was contended, that it did not appear in this case how the fire broke out ; so that it might be by lightning, and so be the act of God.

It was further held in this case, That negligence does not enter into the grounds of this action ; for though the

the carrier uses all proper care, yet in case of a loss he is liable.

2. "The next exemption from losses by a carrier, is where "it is done by the *act of the king's enemies*; but they must be "public enemies, not traitors or felons."

For where it was found on a special verdict, that the plaintiff had delivered to the defendant on board his ship the goods in question, and that there was a sufficient crew for the ship, but that *at night eleven persons boarded the ship as pirates, under pretence of pressing, and plundered her of the goods*; it was adjudged, that though by the admiralty law, if the ship is robbed by pirates, the master is discharged; yet that *that* cannot hold in this case, the ship being *infra corpus comitatus*, the defendant was therefore liable; for superior force should not excuse him.

Morse v. Shue.
1 Vent. 109.
2 Lev. 69.
1 Mod. 85.
S. C.
Barclay v. Higgins.
Pasc. 24 Geo. 3.
quot.
1 T. Rep. 33.
S. P.

3. "And lastly, *The default of the owner of the goods lost* [621] "himself, shall exempt the carrier in case of a loss."

For where in an action against a carrier for negligently carrying a pipe of wine, which by that means burst, and the wine spilt, it was adjudged good evidence for the defendant that the loss happened while the defendant was driving gently, and *arose from the wine being in a ferment*; so that the loss was occasioned by sending it in that state.

Ferrar v. Adams.
Pasc. 10 Ann.
per Holt.
Bull. N. P. 74.

So if a carrier's waggon is full, and yet a person forces his goods on him, and they are lost, the carrier is not liable; for it was the owner's folly to act with so little precaution.

Lovett v. Hobbs.
2 Show. 127.

4. "But for all other accidents and perils the carrier is "liable, from whatever cause they proceed."

As where in an action against a barge-master for goods spoiled by water, the defendant proved, that when the goods were put on board, the vessel was tight, but that the damage was occasioned by a rat's eating out the oakum, through which the water came; it was held to be no excuse.

Dale v. Hall.
1 Willf. 281.

2. "But in order to charge the carrier, these circumstances are to be observed:"

1. "The goods must be lost *while in the possession of the carrier himself, or in his sole care.*"

For where the plaintiffs sent their servant with the goods in question on board the vessel, who took charge of them, and they were lost, the defendant was held not to be liable; for the goods were in the possession not of the defendant, but of the plaintiffs servants.

East India Company v. Pullen.
1 Stra. 690.

TRESPASS ON THE CASE.

2. "The carrier is liable only so far as *he is paid*; for he "is chargeable by reason of his reward."

Tyley v. Morris.
Carth. 485.

For where a man delivered a bag, containing money, to a carrier; and being asked how much it contained, answered 200*l.* for which only he paid, and the carrier gave a receipt accordingly; in fact, the bag contained 400*l.* the carrier was robbed, and he was held to be liable only to the amount of 200*l.* being so much only for which he had received payment.

3. "Under a *general acceptance* a carrier is bound for "whatever he receives, but under a *special acceptance* for so "much only as he *bona fide* undertakes to carry."

Drinkwater v.
Quennel.
Trin. 17,
G. 2. C. B.
Bull. N. P. 75.
* [622]

As if a carrier asks what is in a box, and is told filk; if it be money, and it is lost, the carrier is liable, * unless he made a special acceptance. But the intended cheat may perhaps induce the jury to give less damages than otherwise.

"But under a special or qualified acceptance he is bound "no farther than he undertakes."

Gibbon v. Paynton.
4 Burr. 2298.

For where the owner of a stage-coach put out an advertisement, "That he would not be answerable for money, plate, or jewels, above the value of 5*l.* unless he had notice, and was paid accordingly;" it was adjudged in this case, that all goods so received by this coach were under that special acceptance; and that if money or plate was sent by it, without notice and being paid for, that, if lost, the coach-owner was not liable.

Clay v. Willan.
H. Black. Rep.
298.

And where an innkeeper published such a notice, "that cash, plate, jewels, writings, and other kinds of valuable articles would not be accounted for if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value:" if goods above that sum in value are sent by a person who knows of these conditions, and does not pay the extra sum required, he *shall not recover even to the extent of the 5*l.* or the sum paid for booking.*

Gibbon v Paynton, *supra*.

And note, That the notice in this case was by an *advertisement in the newspaper*, though it was proved that the plaintiff had been seen reading it; but the Court held that notice sufficient; and *per Justice Yates*, A personal communication is not necessary to constitute a special acceptance.

S. C.

2. In this case Lord Mansfield seemed to be of opinion, that in all cases of *sending things of great value*, as money or jewels, by a common carrier, *the carrier should have notice of it*, and be paid accordingly; contrary to the case of *Titchburn v. White*, 1 *Stra.* 145. Somewhat similar to that of *Drinkwater v. Quennel*, *ante*.

4. "A

4. "A delivery to the *carrier's servant* is a delivery to himself, and shall charge him; but they must be goods such as it is the custom of the carrier to carry, not out of his line of business."

As where the plaintiff declared, That the defendant was the owner of a stage-coach, in which he had taken a place, and delivered a trunk to the driver of the carriage, for taking care of which he had given him a gratuity; the trunk was lost, and on action brought, C. J. Holt was of opinion, That this action did not lie against the master, for a *stage-coachman* was not within the custom as a carrier, *unless he takes a distinct price for the carriage of goods*; for his business is only to carry persons. Here was no price paid, the money given to the coachman being but a gratuity, not a price for the carriage; and the master is bound for the act of his servant only while he acts in pursuance of his authority.

Middleton v. Fowler.
1 Salk. 282.

[623]

5. "Where goods are lost which have been put on board a ship, the action may be brought either against the master or against the owners."

For the owners are liable in respect of the freight, and having employed the master; for whoever employs another is answerable for him, and undertakes for him, and the master is chargeable on the same ground; for he may have an action for the freight. But if an action is brought against the owners, *they should be all joined* in the action, for it is *quasi ex contractu* as to all.

Boson v. Sandford.
2 Salk. 440.

Though if one only is sued, he must *plead it in abatement* that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff.

Rice v. Shute.
5 Burr. 2611.

This is the case where the action is brought on the *contract* of the several owners, for if the action arises *ex delicto*, as where the action was for running down another vessel and brought against some of the part-owners, and they pleaded in abatement that there were other part-owners, not joined in the action—It was held to be bad, for the action was founded on a tort, and therefore they were severally liable.

Mitchell v. Farbut.
5 T. Rep. 649.

6. It is not necessary in order to charge the carrier that the goods are lost *in transitu* while immediately under his care; for he is *bound to deliver them* to the consignee, or send notice to him according to the direction: and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable.

Golding v. Manning.
3 Will. 429.
2 Blackst. Rep. 916. S. C.
Hyde v. Trent & Mersey
Comp. 5 T. Rep. 389.

And the law is the same in the case of *letters*, which the post-master *must deliver* at the houses of the inhabitants within the post-town.

Rowning v. Goodchild.
3 Will. 443.

Davis v. James.
3 Burr. 268o.

And note, that either consignor or consignee may bring the action for goods lost, against the carrier; and if the action is brought by the consignor, the objection that the property is in the consignee does not lie in the mouth of the carrier; for the property is no part of the question as to him, and particularly if the agreement for payment was with the consignor.

7. " But, In order to charge a person for goods lost
" when committed to him to carry, it must appear that the
" person was a carrier, and the goods in the way of his
" business."

Garfide v. Proprietors of the
Trent Navigation.
4 T. Rep. 581.

For where the case was, That the defendants received certain goods to be forwarded from *Stourport* to *Stockport*, by the way of *Manchester*, to which place the defendants were carriers; the goods were by them forwarded safely to *Manchester*; it appeared, that according to the course of business, when goods are to be forwarded beyond *Manchester*, if there is any carrier from the place of their destination in *Manchester* when they arrive, they are delivered to him on payment of the carriage to *Manchester*; but if not, that the defendants keep them in their warehouses, without charging any thing for keeping them, till a carrier arrives to whom they may be delivered: the goods in question arrived at *Manchester* on the thirtieth of *September*: there was then no carrier there from *Stockport*, upon which they were housed in the defendant's warehouse, where, by an accidental fire, they were the same night consumed: it was decided, That the keeping them being for the convenience of the owner of the goods, not of the carrier, that he was not liable; and that this was an attempt to charge him as a warehouse-man, which could not be, as he had been guilty of no neglect.

[624]

Dale v. Hall.
1 Will. 281.
Rich v. Kneeland.
Cro. Jac. 330.

But any person carrying goods for hire is a carrier, and chargeable as such for any loss; as waggoners, captains of ships, lightermen, and such like.

But to these are the following exceptions:

Upshare v.
Aldce.
Com. Rep. 25.

1. *Hackney-coachmen* are not carriers within the custom of the realm, so as to be chargeable for the loss of goods, unless paid expressly for the purpose; for they undertake but for the carriage of the *person*: and on the same ground *stage-coachmen* are not liable, unless they are paid extra.

Lane v. Cotton.
1 Salk. 17.

2. The *postmasters general* are not liable for losses of bills or notes of value out of letters put into the post-office, for the post-office is for *intelligence*, not for *insurance*; and it is impossible that the postmasters can be answerable, who are to execute their offices in so many, and so very distant places.

And

And this was so adjudged, though it appeared that the note in question had been taken out of the letter by a clerk employed in the post-office as a sorter of letters.

Whitfield v. Ld.
Le Despencer.
Cowp. 754.

3. By stat. 7 Geo. 2. c. 15. "The owners of ships are only liable for any loss by reason of embezzlement, secreting, or making away of any gold, silver, or diamonds, or other merchandize of value by the master or mariners, to the value of the ship and freight."

Sutton v. Mitchell.
1 T. Rep. 11.
ante.

3. "The third species of bailment is a delivery by way of pledge, which is called *vadium*: as to which,

Com. Rep. 134.
Co. Litt. 89.
Salk. 523.

1. "If the goods so pawned be stolen, the pawnee shall be discharged, for he had a special property in them himself, and therefore is bound to keep them no otherwise than as his own; and he shall therefore still recover the money for which the pawn was given."

[625]

But if the pawner tenders the money, and the pawnee refuses it, and keeps the goods, if they are afterwards lost, the pawnee is chargeable; for after the tender, the goods cease to be a pledge, and the pawner may have trover for them.

Manby v. Westbrook.
29 G. 2. K. B.
Eull. N. P. 72.

2. If the pawn be of somewhat which is not the worse for wearing, as jewels or such like, the pawnee may use them, but then it is at his peril, for if lost so, he stands at the loss; but it is otherwise if the pawn has been locked up, and not used: but if the pawn be of such a nature, that the keeping is a charge to the pawnee, (as if it be a cow or a horse,) the pawnee may milk the cow or ride the horse, and this in recompense of the keeping.

Anon.
2 Salk. 522.

4. "A fourth species of bailment is the delivery of goods for hire; as hiring out an horse, which is called *locatio* or *conductio*; and here the hirer is to take all imaginable care, and if, notwithstanding, the thing be lost, he is not liable."

Com. Rep. 134.

5. "A fifth species of bailment is a delivery of goods for some purpose (as to merchandize) without any reward: it is called an *acting by commission*, and though the bailee is to have nothing for his trouble, yet if there was any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods are lost without any default in him, he is not chargeable; for his having taken reasonable care shall discharge him."

As where the plaintiff had so bailed goods to the defendant, to merchandize for him, which were lost, and on an action brought, the defendant pleaded that he had lodged them safely in a warehouse at Porto Bello, from whence they had been taken by the enemy, and demurrer for cause, that by

Goswell v.
Dunckerley.
1 Str. 681.

putting them out of his possession he had *not taken due care* of them; but *per cur.* If the warehouse was not a place of safety, the plaintiff should have replied so; for a special bailee is not to carry the goods about with him; and if he lodges them in a place of security, he shall not be charged in case of a loss.

Com. Rep. 134.

6. "The last species of bailment is a delivery of goods, from the keeping of which some profit arises to the bailee; as oxen to plough with, which are to be returned in specie; this is called an accommodation, a lending *gratis*; in this case, the borrower is bound strictly to keep the thing so lent, for if he be guilty of the least neglect, he shall be answerable, though he shall not be charged where he is in no fault."

Co. Lit. 37 a.
[626]

Com. Rep. 136.

But in this case the bailee *must use the thing lent in the manner intended*; as if a man lends another an horse to go into the west, and he goes into the north, and the horse dies, the bailee is chargeable; but if the horse be stolen out of the stable without any fault of the bailee, no action lies; but otherwise, if he leaves the door open negligently, and the horse is stolen.

Ibid.

Under this head of bailment seems to fall the action against *innkeepers*, for they are chargeable with any losses happening in their inns by reason of the profit arising either from the keeping of the horses, &c. of their guests, or from the profits from the guests themselves.

As to whom it has been resolved,

Calye's case.
8 Co. 32.
Cro. Jac. 224.

1. The person chargeable as an innkeeper must be the *keeper of a common inn*, for such only are chargeable for the loss of the goods of the guests whom they entertain.

Mason v. Graf-
ton.
Hob. 245.

It was moved in this case in arrest of judgment, that the plaintiff, in his declaration against the defendant, who was an innkeeper, had set out the house only as *hospitium*, not as *commune hospitium*; but it was over-ruled, for *hospitium* means a common inn; it would be *domus*, not *hospitium*, if it was not *commune*.

Calye's case.
Ibid.

2. It must appear that the person robbed in the inn was a *traveller and guest*; for if a neighbour comes to an innkeeper, and desires a lodging, such person is not a guest to recover against the innkeeper.

3. "So he *must be received* as a guest by the innkeeper, in order to make him chargeable."

Bird v. Bird.
3 And. 29.
Anon.
Moor 78.

For if a traveller comes to an inn, and the innkeeper tells him his house is full, and the traveller replies, that he will shift or take his chance in the inn, which the innkeeper suf-
fers

fers him to do, and the traveller is robbed, the innkeeper is not liable; but if the traveller had not used these words, and the innkeeper notwithstanding his first objection had admitted him, he had been chargeable; for in the first case, the traveller takes all risk of loss upon himself, and the innkeeper refuses to take charge; but in the latter case, the admission is an implied waiver of the first denial, and so restores the right of charging him.

So where the case was that the plaintiff came to the defendant's inn with a pack of goods, which he had not been able to dispose of at market, and asked the defendant's wife if he could leave the parcel there till the next market-day? she said, she did not know, as they were very full of parcels: upon this he went into the kitchen and had some drink, and left the parcel down behind him: on rising to go, the parcel was gone. It was adjudged, that the defendant was liable. *J. Buller*, who tried the cause, being of opinion that if the defendant's wife had accepted the charge of the goods upon the special request made to her, that he would have considered her as a special bailee, and not liable, having been guilty of no actual negligence: but that he considered this as the common case of goods lost at an inn, in which case the innkeeper is liable.

Bennett v. McLor.
5 T. Rep. 273.

4. "The loss to the guest must be occasioned by the act of the innkeeper, or some of his servants, or through their neglect."

Therefore, if the guest is robbed by his own servant or companion, the innkeeper is not liable, because it was the guest's fault to have such persons with him; but if the innkeeper appoints another person to sleep in the room with his guest, and he is robbed, the innkeeper is liable.

Calye's case.
8 Co. 22.

[627]

5. The innkeeper is only answerable for such goods of his guests as are within his house, and so are under his care: and therefore if a guest at an inn orders his horse to be turned out to grass, and the horse is stolen, the innkeeper is not liable; but if the innkeeper had turned the horse to grass, out of his own head, he had been liable, for it was his own act, and the horse entirely in his own care.

S. C. Ibid.

And even while the things are in the inn, if the innkeeper directs the guest to place his goods in a particular place, under lock and key, or he will not be answerable for them, and the guest refuses or neglects to do so, but puts them in another place, and they are lost, the innkeeper in that case is not chargeable.

Brand v. Glass.
Moor 158.
Dyer 206.

But without such particular direction from the innkeeper, if the goods are lost, it will be no excuse to say that he delivered the key of the chamber to the guest, and that he did not acquaint

Calye's case.
Ibid.

quaint the innkeeper what the goods were ; or that the thief is discovered.

6. " As the innkeeper is chargeable on the ground of the profit he derives from his guest or his goods, *where there is no profit* to the innkeeper, there shall be *no charge*."

Gelley v. Clark.
Cro. Jac. 188.
Noy. S. C.

Therefore if a guest comes to an inn, and departs leaving his goods there, and tells the innkeeper that he will return in a few days, and during his absence the goods are lost, the innkeeper shall not be charged ; for he has no profit or gain from the keeping of such dead goods, and therefore shall not be chargeable for their loss.

But to this are these exceptions :

Sir Edwin Sandy's case.
Cro. Jac. 189.

1. It must not be a temporary absence ; as if the guest goes out in the morning about business, and returns before night, this is not such an absence as shall excuse the innkeeper.

York v. Grindstone.
Salk. 388.

2. This is confined to the case of *dead goods* ; for if the guest leaves *his horse* there for any time, though he is not there himself, the innkeeper shall be charged in case of a loss ; for the standing of the horse is *a profit to the innkeeper*, and in respect of that he is chargeable.

Crofts v. Andrews.
Cro. Eliz. 622.
* [628]

* 7. It was adjudged in this case, That where to an action against an innkeeper for goods lost in his inn, he pleaded, that at the time that the plaintiff lodged in his inn, *he was sick and of non-sane memory*: on demurrer to this plea, it was held, That if a man keeps an inn, he ought at his peril to take care of the goods of his guests, and if he be sick, that his servants ought ; and that it lieth not for him to say that he was of non-sane memory to disable himself in this action, no more than in debt on an obligation.

Calyc's case.
8 Co. ante.

8. The writ against innkeepers, mentions only *bona & catalla*, which properly does not comprehend deeds or writings, which are only *choses in action* ; yet by reason of the words in the writ, "*ita quod hospitibus nullum eveniet damnum*," they are comprised ; and for the loss of these the plaintiff may declare specially.

Ibid.

But these words confining the loss to moveables, the innkeeper shall not be liable for any *loss or injury done to the person* of his guest while in the inn ; as an assault, battery, or such.

Beedle v. Morris.
Cro. Jac. 224.
Yelv. 162.
S. C.

9. If a servant is robbed of his master's property, *the master* may maintain this action against the innkeeper at whose inn the goods were lost.

And in such suit by the master, he need not show that the servant *was on a journey*, for perhaps he was at the end of his journey; as in *London*, on his master's business.

Drope v.
Thayne.
Noy. 79.
Poph. 179.

10. If *one joint-tenant of goods* is robbed, both may join in this action.

Drope v.
Thayne.
Latch. 127.

11. Another case in which an action lies against an innkeeper as such, is *for refusing to entertain a traveller*, and to provide his horse with meat, he tendering him the proper price for the same.

Anon.
Keilw. 50.
Anon.
Dyer 158. pl. 33.

2. OF INJURIES TO PERSONAL PROPERTY IN CASES WHERE THERE IS NO TRUST.

The principal injuries under this head, are, 1. For maliciously suing out a commission of bankruptcy: 2. For deceit in sales: 3. For not procuring an insurance: 4. For the malicious use of any power or authority.

Of Injuries by maliciously suing out a Commission of Bankruptcy.

If any person shall *maliciously sue out a commission of bankruptcy against another*, which commission is afterwards superseded, an action on the case lies against such petitioning creditor at the suit of the bankrupt; and this notwithstanding the bond given in pursuance of stat. 5 G. 2. c. 30. to the chancellor in the penalty of 200l. conditioned to prove the bankruptcy, and by him assignable to the bankrupt, for this bond may be inadequate to the damage sustained; and though there is the same remedy under the statute, yet it is a common law remedy, and the statute being in the affirmative, both stand together.

Brown v. Chapman.
3 Burr. 1418.

[629]

2. Of Injuries from Deceit in Sales.

This respects warranties or frauds in the cases of sales:
1. Where there is some fraud or deceit on the part of the seller: 2. Imposition from cheating, or false pretences.

Fraud or deceit in the seller may be either, 1. In the *value of the thing sold*: 2. In the *seller's title to it*.

1. "Where a thing is of a *certain value*, and *that known to the seller*, but cannot be known to the buyer; for any deceit in the affirming the value to be different from what it is, this action lies."

As where the landlord of an house, wishing to dispose of his interest in it, *affirmed the rent to be more than it really was*, whereby

Rifney v. Selby.
1 Salk. 211.

whereby the purchaser was induced to give more for it than it was worth, this action was held to lie; for the value of the rent was a matter of private knowledge between the landlord and tenant.

S. C.

“ But if the buyer has it in his power to inform himself of the true value and neglects it, the action will not lie.”

Lord Raym.
1118.

As if the landlord had only said, that J. S. would give so much for it, whereas J. S. had never offered any thing, the action would not lie, for the buyer might have enquired from J. S. and been informed of the truth.

Leakins v.
Chiffell.
1 Sid. 246.

This is the case of things of certain value, but where the things sold are of *uncertain value*; that is, which may depend on whim or fancy, as *pictures, or such things* which may be of more value to one person than to another, there no action will lie, in case of taking an exorbitant price.

2. “ From these cases it appears, that a man is chargeable in the case of selling any thing for more than its value *knowingly*.”

Harvey v.
Younge.
Yelv. 20.

“ But it also lies for a sale of a thing where the seller is ignorant of the value, and that is, where he sells it *with a warranty* of its value or quality.”

Chandler v.
Lopus.
Cro. Jac. 4.

[630]

As where the plaintiff declared that the defendant, being a goldsmith, and having a skill in precious stones, had a stone which he affirmed to be a *Bezoar-stone*, which he sold to him for 200*l*. *ubi re vera* it was not a *Bezoar-stone*; the defendant pleaded not guilty, and the plaintiff had a verdict; but the judgment was afterwards arrested, because that the declaration had not charged either that the defendant sold it *knowing* it not to be a *Bezoar*, or that he had warranted it for such a stone.

3. “ If a *servant* sells any thing in the way of his master's business, and *warrants* it, if there is any fraud or deceit, the master is liable.”

Grammar v.
Nixon.
1 Stra. 653.

As where a goldsmith's apprentice sold an ingot of gold and silver, upon a special warranty that it was of the same value with an assay then shewn, and upon evidence it appeared, That he had forged the assay, and made the ingot out of a lodger's plate that he had stolen; the master was held to be liable.

“ And even though the seller himself has been deceived by his servant, yet is he liable to the buyer.”

Hern v. Nichols.
1 Salk. 289.

For where a merchant sold silk to another, which afterwards appeared not to be of the kind the purchaser meant to buy, whereby he was imposed upon in the value; he recovered

covered against the merchant the feller, though it appeared that there was no actual deceit in the feller, but that it was in his factor beyond sea; for he should be answerable for the deceit of his factor *civiliter*, though not *criminaliter*: and since somebody must suffer, it was more reasonable that he who trusted the factor should be a loser than the other.

4. "But in order to charge the feller by reason of his warranty, it must be observed,

1. "That the warranty does not *extend to defects visible to the eye of the buyer*, for of these he must be apprized at the time of the sale; but if the defect is not visible, there a general warranty shall extend to it, and subject the feller in case of a fraud."

As on a warranty on the sale of cloth that it is of such a length, and it turns out to be otherwise, this action lies against the feller; because such a defect is not visible to the eye, but is to be discovered only by measuring. Finch's Law, 18.9

But where the warranty was on *the sale of an horse*, which was warranted sound by the feller, and it appeared afterwards that *he was blind*, this action was held to lie; for though blindness is a defect in general visible to the eye, yet in horses it requires skill to discern it. Butterfield v. Burroughs. Salk. 24.

2. "The warranty must be made *at the time of the sale* and not after it, in order to charge the vendor; for if made after the sale, it is made without consideration: neither does the buyer then take the goods on the credit of the feller." Finch's Law, 28.9. [631]

"So the warranty should be in the present tense, that the thing is sound, not that it will be sound." 3 Black. Comm. 159.

"And where there is an express warranty, the warrantor undertakes that it is true at the time of making it, and no length of time elapsed after the sale will alter the nature of a contract originally false; and if it be false and fraudulent on the part of the feller, he will be liable to the buyer in damages, without either a return of the thing or notice." Per Lord Loughborough. H. Black. Rep. 19.

For where in an action on the warranty of a mare sold by the defendant to the plaintiff, it was proved, That in March 1787 the defendant sold the mare to the plaintiff, and warranted *her sound and free from blemish and vice*: soon after the sale, the plaintiff discovered that she was unsound and vicious; he however kept her for three months, and endeavoured to cure her: at the end of three months he sold her, but she was returned as unsound. After she was so returned to the plaintiff, he kept her till the month of October, when he returned her to the defendant, who refused to receive her: on her way back to the plaintiff's stable she died; and Fielder v. Staik-in. H. Black. Rep. 17.

and it was the opinion of farriers *that she had been unsound a twelvemonth before*; it also appeared that the plaintiff and the defendant had been often together, during the period he had had her, but it did not appear that the plaintiff had ever acquainted the defendant with the circumstance of her being unsound: the jury found a verdict for the plaintiff; and on a motion for a new trial, the Court held the above doctrine, and refused it.

3. "An offer of a warranty *at one time*, shall not extend "to a *subsequent sale* of the same thing."

Anon.
1 Stra. 414.

For where the defendant came to the plaintiff, who was a sword-cutler, and offered to sell him a second-hand sword, and warranting the hilt to be silver; the plaintiff offered him a guinea and a half for it, which the defendant then refused; but having offered his sword to many sword-cutlers, and none bidding him so much as a guinea and a half, he returned to the plaintiff, who then would give him but twenty-eight shillings, which the defendant took: it appeared afterwards that the gripe only was silver, and the rest brass; upon which the plaintiff brought his action on the *first warranty*, when the Court were of opinion, *That it did not extend to the subsequent sale*; and the plaintiff was nonsuited.

Southern v.
Howe.
1 Roll. Rep. 5.
*[632]

* 4. If the vendor, knowing the goods to be unsound, *uses any art to disguise them*: or if they are in any shape different from what he represents them to be to the buyer, this action lies; for this artifice shall be deemed equivalent to an express warranty.

2. "The second species of fraud in the seller on which "this action is founded, is where there is a fraud in the "representation he makes *of his title* to the thing sold."

Harding v.
Freeman.
Style, 311.

As where the plaintiff declared that the defendant, affirming a certain horse to be his own, and that he had bred him, sold him to the plaintiff; whereas in fact *he had never bred him, and he was the property of J. S.* the plaintiff recovered notwithstanding there was no express warranty or averment that the defendant knew that the horse belonged to J. S.

Furnis v. Leicester.
Cro. Jac. 474.
Crofts v.
Gardiner.
S. P.
Show. 63.

And the buyer may maintain this action against the seller, who so sells without any title the goods of another, *though he has never sustained any damage, or the true owner has not retaken them, or sued him for them*; for the sale under these circumstances is itself an offence; and if he should wait till the goods were retaken, he might be remediless, and sustain a mischief.

Medina v.
Stoughton.
Salk. 210.
L. Raym. 593.
S. C.

2. The gift of the action therefore is the sale, the seller *knowing* the goods not to be his own property; for the declaration must be, that he did *it fraudulently or knowing them* not

not to be his own: it is therefore incumbent on the plaintiff to prove that fact, that the defendant knew the things sold not to be his own at the time of the sale; for if the defendant had a reasonable ground to believe them to be his property (as if he bought them *bona fide*) no action will lie against him; but the defendant cannot plead such matter, he must give it in evidence.

3. Of the same nature with this fraud is where a person affirming that certain goods are the property of his friend, and that *he has authority to sell them*, in fact sells them, he having no such authority; in which case this action lies for the deceit.

Warner v. Talerd. quot.
9 Danv. 176.
pl. 7.

In this case the deceit being in the false affirmation, it will be sufficient for the buyer to prove them the goods of another, without proving that the defendant knew them to be so (for it need not be averred in the declaration); and this proof would be sufficient to put the defendant upon proof that he had authority to sell them.

Bull. N. P. 30.

But in both cases, if the seller is *out of possession* of the thing sold at the time of the sale, no action will lie against * him, though the thing sold was not his own, unless there was an express warranty; for being out of possession, there was room to question his title, and in such cases it is *caveat emptor*.

Medina v. Stoughton.
Salk. 218.
2 Ref.

* [633]

As where the defendant, affirming that he was incumbent of the living of *Stoke*, sold the tithes to the plaintiff, when in fact he was not incumbent, and had no title, the action was held not to lie on the ground above-mentioned, he not being in possession.

Roswell v. Vaughan.
Cro. Jas. 196.

2. The second ground of this action, as founded on deceit, is where an injury is done to any person from an imposition *in cheating or using false pretences*.

As where money was left in the hands of a third person to be delivered to the plaintiff, and the defendant pretending to such person that he was the plaintiff, obtained the money; this action was adjudged to lie against him.

Thompson v. Gardner.
Moor. 583.

“ So for cheating a person with false cards or dice of any sum of money, this action will lie.”

Harris v. Bowden.
Cro. Eliz. 90.

But it was decided in this case, That where a person, affirming himself to be of full age, had obtained several sums of money, whereas in fact he was under age, and so not liable to the money borrowed, that the action did not lie; for being an infant, his contracts were all void.

Johnson v. Pye.
1 Sid. 258.

So assuming a false character, and by that means committing a cheat, is actionable: as if a man, pretending to be

Skin. 119.
Garrard v. Richardson.
Trin 36. Car. 2.

Bull. N. P. 32. be single, prevails on a woman to marry him, when in fact he is married, this action will lie. *Sed quare?* this being felony.

Cooper v. Whet-
ham-
1 Lev. 247.

But if a woman who is married commits a similar fraud, no action will lie; for all acts of a *feme covert* are void.

Pasley v. Free-
man.
3 T. Rep. 51.

3. A third ground of this action founded on deceit, is where a party knowing another to be in bad and insolvent circumstances, represents him to a third person as a man of credit and property, by which such third person is induced to trust him with goods or property. In which case this action lies, though the party derives himself no advantage from it, nor colludes with such third person.

Cowen & al v.
Simpson.
Espin. N. P.
Cas. 290.

But if a person employs an agent to take orders, and a representation is made to him of the solvency of any person, whom he therefore advises his employers to trust for goods, if at the time the agent knew that such person was not solvent, though he did not communicate it to his employers, they cannot maintain an action against the person that made such false representation.

3. A third case of injury to personal property for which this action lies, is,

For not procuring an Insurance.

Smith v. Laf-
celles.
2 T. Rep. 187.

For where a merchant gives instruction to his correspondent to effect an insurance on a ship of his, and he neglects to do it, *case* lies under the following circumstances: 1st. When the merchant abroad has effects in the hands of his correspondent in *England*; he is bound to insure, if ordered so to do; for the merchant abroad has a right to appropriate his money in the hands of another in any manner he thinks proper: 2dly, When there are no effects of the merchant abroad in the hands of the other, but the course of dealing has been such, that the one has been used to send orders for insurance, and the other to comply; in such case, if the merchant here neglects to make an insurance, he shall be liable, unless he has given notice to discontinue such dealing: 3dly, Where the merchant abroad has sent bills of lading to his correspondent in *England*, he may engraft on them an order to insure, as the implied condition on which they are to be accepted, which the merchant here must obey if he accepts them.

[634]

Wallace v. Tell-
fair, Sitt. Guild-
hall 1786,
coram Buller,
Just. 2 T. Rep.
187.

But if the merchant abroad limits the merchant in *Eng-land* to too small a premium, so that no insurance can be procured, the merchant here shall not be liable.

So

So where the merchant here uses due diligence to procure an insurance, which cannot be done, (as here, because the ship was not registered at *Lloyd's* coffee-house,) and he afterwards, by other means, gets an insurance, which turns out ineffectual, but without his fault; (as where it was sent to a house at *Newcastle*, which house fraudulently kept the policy;) the merchant here was held to be discharged.

Smith v. Cado-
gan. 2 Term
Rep. 187.

So where the plaintiff had purchased certain premises from the defendant in the month of *August* 1792, on which the defendant had at that time a subsisting policy, which expired the *December* following; the defendant undertook to get the policy renewed, and in fact did get it renewed, and charged 16l. to the plaintiff for the premium, but had neglected to get the assignment of the policy allowed at the office. The premises were burned, and the plaintiff was unable to recover against the fire-office, on account of the neglect of having the assignment allowed, and therefore brought this action against the defendant to recover the amount of his loss. It did not appear that the defendant had any consideration for getting the policy effected; but Lord *Kenyon*, on the authority of *Wallace v. Telfair*, *supra*, held, that where a party voluntarily undertook to procure an insurance for another, and did get a policy underwritten, but did it so unskilfully, that the party could derive no benefit under it, although there was no consideration, yet he was liable to an action.

Wilkinson v.
Coverdale.
Esplin. N. P.
Cas. 75.

“For to maintain this action, the defendant must be guilty of a breach of orders, gross negligence, or fraud; and to these matters the attention of the jury is to be directed, who, if they find that the defendant was guilty of none of these, the Court will give judgment for him.”

Per Ld. Man-
field.
Cow. 480.

Therefore where the plaintiff, who was a merchant in *Alicant*, sent instructions to the defendant, who was his agent in *London*, to insure a cargo of fruit; the instructions were general, nothing as to insurance in any particular place or manner; the defendant insured the cargo at the *London* Assurance-office, at which office, in policies upon fruit, there is an exception of being “free from particular average;” the policy was made with this exception: a loss happened, but it was only a partial one, so that the plaintiff had no benefit from the policy, and he brought this action for neglect in effecting the insurance; but it not appearing that he had been guilty of any gross neglect, or of any *male fides*, he deriving no advantage from the insurance made in that way, more than in any other, the jury found for him; and on a motion for a new trial, the Court confirmed the verdict.

Moore v. Mor-
gue.
Cowp. 479.

4. Of Injuries arising from the malicious Use of any lawful Power or Authority to the Oppression of another, and the Injury of his Property.

Sutherland v. Murray, quot. 1 T. Rep. 538.

As where this action was brought against the defendant, who was governor and vice-admiral of *Minorca*, by the plaintiff, who was judge of the vice-admiralty court, "for maliciously and without probable cause suspending him from his office, *per quod* he lost the profits and emoluments of the same:" it appeared that the defendant had legal authority to suspend, till the king's pleasure was known; that he had professed himself ready to restore the plaintiff on his making a particular apology; and the king approved of the suspension unless the terms were complied with; notwithstanding which the plaintiff recovered 500*l.* damages, on the ground that the suspension was malicious, and had been confirmed, by means of the defendant's false and malicious representations at home.

Sutton v. Johnstone. 1 T. Rep. 493.

But where the action was by the plaintiff, Captain *Sutton*, for suspending him from his command of his ship, and carrying him about with the fleet as a prisoner, until he was tried by a court-martial, when he was acquitted; against the defendant, who was commodore and commanded it, the action was held not to lie; as being of dangerous consequences to the discipline of the navy, to permit such actions to be brought against the commander, and particularly as he was subject himself to suspension and dismissal from the service for any cruelty or oppression to his officers; and that therefore the only redress was by a court-martial.

3. OF INJURIES TO REAL PROPERTY.

Injuries to real property fall under the two heads of, 1. *Nuisance*; 2. *Disturbance*: the first respecting corporeal, the latter incorporeal hereditaments.

I. OF NUISANCE.

Nuisance is either to the house or to the land.

I. Of Nuisance to the House.

9 Co. 58.

1. "If a man has an ancient house, and another builds so near to him that he deprives him of the benefit of light and air, by darkening his windows; this action lies against the wrong-doer."

Eury v. Pope. Cro. Eliz. 218.

* [636]

"* But to maintain this action, it is said that the house must be an *ancient house*; that is, have stood there time immemorial; for if two men have land adjoining, and one builds

“ builds a house on his own land, and makes his windows
 “ look into his neighbour’s land, though his house may
 “ have stood thirty or forty years, yet may his neighbour
 “ build an house on his own land, and obstruct the other’s
 “ lights; for *cujus est solum ejus est usque ad cælum*, and it
 “ was folly in the first person to build so near the land of
 “ another.”

But, however, in an action for stopping and obstructing the plaintiff’s lights, Justice *Wilmot* said, that where an *house has been built forty years, and has had lights at the end of it*, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption, that there was originally some agreement between the parties: and he said, that as twenty years was sufficient to give a title in ejectment, on which he might recover the house itself, he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

Lewis v. Price.
Worcester Sum.
Aff. 1761. MSS.

2. But if a man builds an house upon any part of his own land, and afterwards sells that house to another, neither the vendor nor any person claiming under him shall be allowed by any erection to stop the lights; for no man shall be allowed to do an injury in derogation of his own grant.

Palmer v.
Fletcher.
1 Lev. 122.

3. But where a man has such ancient messuage, and so 9 Co. 58. b. prescribes to have his lights uninterrupted, no contrary prescription to stop the lights shall be alleged against it; for each being supposed to have existed from time immemorial, the latter cannot be deemed more ancient than the former.

4. “ It should seem, that where a man builds his house
 “ near a street, he is entitled to all the privileges of an an-
 “ cient messuage.”

For this action was adjudged to lie against the commis- sioners for paving, for raising the street so high as to obstruct the plaintiff’s lights and windows; for the ground of the street being appropriated to the public, excludes the idea of folly in building near the ground of another, and close to the street is the most proper situation.

Leader v. Mox-
on & al.
3 Will. 461.
2 Black Rep.
924. S. C.

5. But raising a wall to obstruct a prospect, or in anywise to prevent it, is not actionable; for it only deprives the party of a matter of pleasure, and abridges him of nothing either useful or necessary.

9 Co. 58.

* 6. A recovery of damages in this action does not discharge the nuisance; for every continuance of it subjects the offender to a new action, and therefore a person may recover damages for a nuisance to an house which commenced before he came into possession, if it existed when he entered.

Westborn v.
Morlaunt.
Cro. El. 191.
2 Leon. 103.
S. C.

*[637]

Rosewell v.
Prior.
Salk. 460.

Therefore where the plaintiff recovered damages against the defendant for a nuisance to his house, and the defendant afterwards under-let it, and this action was for a continuance of the nuisance *after the under-lease*, it was held well to lie; for as he was before liable to an action for the continuance, he should not discharge himself by his own act of under-letting; and as he had a rent in consideration of the continuance of the nuisance, he ought to answer for the damages it occasioned.

Rippon v.
Bowles.
Cro. Jac. 473.

So also may an action be maintained *against the assignee* for a continuance of the nuisance; but with this distinction, that where the whole mischief has been done to the plaintiff by the first erection, there the action will not lie against the assignee; but where the continuance occasions a new nuisance, the assignee is liable.

Symonds v.
Seybourne.
Cro. Car. 325.

7. This action may be maintained by the *lessee for years*, for obstructing the lights of an ancient messuage, grounded on the *prescription*, notwithstanding the weakness of his estate; for the prescription is to the house, not to the person.

Jeffar v. Giffard.
4 Burr. 2141.

So also may he in *reversion*, as well as he in possession, maintain an action for a nuisance, by obstructing the lights; for it is an injury to the *inheritance* as well as to the present enjoyment; and each may have his own action.

2. A second species of nuisance to the house consists in *over-hanging it*, or building so near to the house of another that the water falls off his roof on that of his neighbour, and thereby injures and rots it.

Reynolds v.
Clark.
1 Stra. 634.

Of the same nature also was the case of putting up a spout, which conveyed the water into the premises of the adjoining neighbour: this was a nuisance, and actionable.

Wm. Aldred's
case.
9 Co. 57 a.

3. A third species of nuisance to the house, is by *infecting it with bad and noisome smells*, so as to make it unwholesome to reside in; but this falls under the first head of Injuries to the Person.

[638]

2. Of Nuisance to the Land.

1 Roll. Ab. 89.
Rex. v. White.
1 Burr. 260.

1. " If any person erects a smelting-house, or works for making *aqua fortis*, or such like, the *vapour and smoke of which spoils the grass or corn, or injures the cattle* of his neighbour, it is a nuisance to the land, for which this action lies."

Westbrow v.
Mordaunt.
Cro. Eliz. 197.

2. If a person *suffers the ditch adjoining to his neighbour's land to become foul*, or throws stones or rubbish into it, which causes it to overflow, and so injures the land, this action will lie for the injury.

3. So, if a person who has a right to a stream of water running to his land or mill, and another person turns it; or if that person, having a right to the use of it in a certain proportion, varies from that proportion, trespass on the case will lie against him. As in this case, where the defendant prescribed to have water from a certain watercourse, running through the plaintiff's ground, to two pits on his ground, for watering his cattle, it was adjudged that an action lay for deepening and widening those pits. *Brown v. Best.* 2 Will. 174.

But where a man has by prescription a right to a stream of water, he may vary the uses to which it is applied: as where formerly there was fulling-mills, he may alter them to corn-mills, if he does not alter the quantity of the water. *Luttrell's case.* 4 Co. 84.

4. Another injury to the land is, if a man suffers such a number of conies upon his land that they go in on that of his neighbour, and spoil it, and yet for this no action will lie, for they are animals *feræ naturæ*, in which he has no property. *Vid. post.* *Bowlston v. Hardy.* Cro. Eliz. 547. 5 Co. 104. S. C.

Note; That where a nuisance is done to the land of two tenants in common, they shall join in this action; for it is personal, and concerns the profits of the land. *Some v. Barwith.* Cro. Jac. 231.

5. Another injury to the land for which this action is maintainable is, for not keeping the fences in repair, by which a party is injured.

And such action must be brought against the occupier of the land, and will not lie against the owner of the inheritance, who is not himself in possession; for the landlord cannot be deemed a wrong-doer for the neglect of his tenant. *Cheetham v. Hampson.* 4 Term Rep. 318.

But if the landlord is bound to repair, in such case the action must be brought against him. *Payne v. Rogers.* 2 H. Black. 359. ante 598.

6. "Another injury to the land for which this action lies, is against a parson or impropriator for not taking away his tithes, which, by lying on the grass, rot and destroy it."

But, 1. "A parson or impropriator is not obliged to take away the tithes till they are all set out: so that no action will lie till then, except there is a custom to the contrary." [639]

For where the action was brought for not taking away of tithes by degrees as cut, the tithes being so set out, grounded on a custom so to take them, it was resolved, 1. That it was not sufficient to establish this mode of tithing, that the former parson, fifty years ago, had so taken the tithes: 2. Nor that such mode was the custom of adjoining parishes; though it had been otherwise if it had been the custom of the whole county. *Furneaux v. Hutchins.* Cowp. 807.

3 Burr. 1892.

2. "Where the tithes are set out, no notice by the common law is necessary; but it is required by the ecclesiastical law: And this notice is often required by custom; in which case it is good."

Butler v.
Heathby.
3 Burr. 1891.

For where this action was brought against the plaintiff, who was impropriator of tithes, for not fetching away the tithes within a reasonable time after being set out, the defendant relied on the custom of the parish, "that notice should be given to the owner of the tithes, of the setting of them out;" which in this case had not been done: the custom was held to be a good and reasonable one; and the defendant had judgment.

These are the most material cases falling under the head of Nuisance. I shall now consider injuries to incorporeal hereditaments under the head,

2. OF DISTURBANCE.

1. Of Disturbance of Ways.

Cantrell v.
Church.
Cro. Eliz. 84.
3 Burr. 466.
S. P.

1. "If a person has a right to a private way over the land of another, and that way is obstructed or shut up, the person having such right may maintain for such obstruction an action on the case."

Finch's Law 63.
Co. Litt. 56.

2. This right of way arises, 1. From the grant of the owner of the soil: 2. From prescription, which supposes an original grant: 3. From operation of law; as where a man grants a piece of ground in the middle of his field, he tacitly gives a right of way to it, as necessary to its enjoyment.

Clarke v. Cogg.
Cro. Jac. 170.

So where a man having four closes, sold three of them, and reserved the middle one, without any saving of a way to it, and there was none but over the closes he had sold; it was resolved, that the law reserved to him a right of way to it, over those he had sold.

[640]

As to the first: "Constant and uninterrupted usage of a way, though not going the length of prescription, shall carry such a presumption of a grant, as to give a good and valid right of way over the lands of another."

Keymer v.
Summers,
Hereford
Summer
Assizes 1769.
Buller N. P. 74.

For where in an action for obstructing a way, the plaintiff proved, that one *Fowler* was seised both of plaintiff's tenement and of the defendant's close; and in 1753 had conveyed to the plaintiff the tenement, with all ways therewith used, and that this way had gone with the tenement as far back as memory could go: the defendant produced a subsisting lease for three lives from *Fowler*, made in 1723, by which he demised the field in question in as ample a manner as one *Rock*, a former tenant, had had it; and in this lease there

there was no exception of a way over the close. Just. *Yates* held, that by the lease, without the reservation of way, the way was gone, and so could not pass under the words *all ways* in the conveyance; but as the defendant's lease had by 30 years preceded the plaintiff's conveyance, and the way had been used all that time, that was sufficient to afford a presumption of a grant or licence from the defendant, so as to make it a way lawfully used at the time of the conveyance, and then the words of reference would operate on it, and the way pass.

As to the second: "Where a way is claimed by prescription, if a grant of it appears, the prescription is necessarily at an end, and mere usage after gives no right."

For where in case for stopping a way, the plaintiff proved it to have been a way as far back as witnesses could remember; but defendant producing a lease made of this way for 56 years, to the intent that it might be a passage during that time, which term had expired *A. D.* 1728, some years before this action was brought; the Chief Justice held, that the leaving the way open for a few years after the term ended, was not sufficient to make it a gift to the public. *Rex v. Hudson.* 2 Stra. 909.

"But though a person may have a good right of way, yet that shall be destroyed by unity of possession, unless it is a necessary one, and then it shall not." *Surry v. Pigot.* Larch 153. Poph. 172.

As if *A.* seised of *Blackacre*, and *C.* of *Whiteacre*, and *A.* has a right of way over *Whiteacre* to *Blackacre*, and *A.* afterwards purchases *Whiteacre*, the right of way is extinct: and if *A.* afterwards enfeoffs another person of *Whiteacre*, the severing of the possession does not restore the right of way, if no reservation or grant is made of it; for a right of way lying in grant, and being once extinct, by grant only can it be revived. 11 H. 5. 4. Year-book. 21 E. 3. 2. 2 Shep. Ab. 156. [641]

2. A second species of disturbance for which this action lies, is for a disturbance of the right of *common*.

But, 1. The ground of this action as far as respects the commoner is, that he is deprived of his common, so that he cannot enjoy it in so ample a manner as he is entitled; and therefore if *the trespass be so small, that the commoner has not any or a trivial loss*, this action will not lie for him; but the lord may have trespass immediately for any injury. Robert Mary's case. 9 Co. 112.

And one commoner may have this action against another for surcharging, though he himself has surcharged the common. *Hobson v. Todd.* 4 T. Rep. 71.

2. The commoner has no property in the soil, for that still remains in the lord, who may exercise any act of ownership which does not detract from the commoner's right. 1 Burr. 265. Bellew v. Langdon. Cro. Eliz. 876.

right of common : as he may put conies on the common, and the commoner cannot destroy them, or fill up their burrows.

Cooper v.
Marshall.
3 Burr. 260.

But if the conies increase so fast and in such numbers as to destroy the common, the commoner can have this action against the lord, on the ground that he cannot enjoy his common in so ample a manner, &c.

Sadgrove v.
Kirby.
6 T. Rep. 483.

So neither can a commoner justify the cutting down of trees planted by the lord on the waste, though there be not a sufficiency of common left, his remedy *must* be an action on the case or by an assize.

Bateson v.
Green.
5 T. Rep. 411.

So the lord may dig clay-pits on the common, and empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been immemorially exercised by the lord—for the right of the commoners may be subservient to the lords.

S. C. in notis.

So the lord may with the *consent of the homage* grant part of the common for building, if he has immemorially used such right.

Shakespeare v.
Rippen.
6 T. Rep. 741.

So the lord or his grantee may inclose part of the common against tenants having common of pasture, notwithstanding they have other rights, as digging sand, &c. provided he leaves sufficient *common of pasture*.

Sadgrove v.
Kirby, *supra*.

But if the lord totally exclude the common, he may do whatever is necessary to let himself into the common.

Vernon v.
Goodrich.
3 Stra. 5.

3. Turning an ancient *watercourse* is another injury for which this action lies.

3. A third species of disturbance is, that to the right of holding *fairs* or *markets*.

If any person is entitled to hold a fair or market, and another person sets up another fair or market so near to the former as to prejudice its custom, this action lies for the injury,

Hale on
F. N. B. 184.

1. "But to support this action, it must appear that the plaintiff's fair or market was the elder one, for otherwise he is himself the wrong-doer."

Braeton, lib. 2.
chap. 24.

2. It is sufficient to make it a disturbance, that the second fair or market is erected *within seven miles* of the former; that is, one-third part of a day's journey, reckoned at 20 miles; for so the day being divided into three parts, he has one-third to go, one third to return, and one-third for his business.

3. "So if the second fair or market is held *on the same day as the former*, it is a disturbance; and even if held on a different day it may be a disturbance."

As where the plaintiff declared generally that he was seised of a market, and that the defendant had erected another, without any lawful warrant, within seven miles of his market. Exception was taken in arrest of judgment, that the plaintiff had not said that it was on the same day; but it was over-ruled, particularly it being after a verdict.

Yard v. Ford.
2 Saund. 173,
1 Lev. 296,
S. C.

4. A fourth species of disturbance is,

If a man is entitled by prescription to have all the corn of the tenants of a certain manor ground at his *mill*, this action lies against any of the tenants who carries his corn elsewhere to be ground.

Coryton v.
Lithebye.
2 Saund. 115.

And a custom, "That all the inhabitants, tenants, and resiants within the manor shall grind all their corn, grain, and malt, which by them or any of them should be used or spent, ground within the manor, and ground at the plaintiff's mill, and not elsewhere," is a good and legal custom: and a bill filed in the Exchequer, wherein the occupier of the mills was plaintiff, and some of the inhabitants, resiants within the manor were defendants, in which an issue was directed to try the custom, is good evidence in an action on the case.

Cort v. Birbeck,
Doug. 238.

5. A fifth species of disturbance for which this action lies: if a man has an ancient *ferry*, and another sets up a new ferry near it, the owner of the first ferry may have his action for the injury, in drawing away his custom.

Blissett v. Hart,
Mich. 18 G. 2.
B. R.
Bull. N. P. 76,

For he who has an ancient *ferry* is compellable by law to find boats safe and fit for the purpose; and if he does not, he may be amerced: and as the law therefore imposes such a burden on him, it will protect him in the exclusive and uninterrupted enjoyment of such right. And therefore where the law has imposed no such obligation, it gives no such exclusive right.

2 Roll. Ab.
140.

As if a man sets up a new *mill* or *school* in the neighbourhood of an ancient one, an action will not lie, though a damage may thence accrue to the former mill or school; for such rivalry is of public benefit and advantage, and it is *damnum absq. injuria*.

1 Roll. Ab. 107.
Hale on
F. N. B. 184.

"But where a ferry is claimed by prescription, the owner shall only have his actions for *direct injuries* to his *right*."

For where the plaintiff claimed as lessee of the ferry from *Kingston-upon-Hull* to *Barton*, and brought his action for an encroachment on his right; it was proved that the defendant, who was the owner of a market-boat belonging to *Barrow*, a place two miles lower down the river than *Barton*, had at different times ferried over persons to *Barton*; that there was a daily ferry between *Kingston* and *Barton*, but that the ferryman

Tripp v. Frank.
4 T. Rep. 666,

[643]

TRESPASS ON THE CASE.

man was not obliged to provide boats to any place but Barton; it was adjudged, that the action would not lie, for the prescription went only to carry persons to Barton, and could not be extended to the carrying persons to a different place, unless that was done colourably and fraudulently to prevent the use of the regular ferry, as by landing the passengers within a short distance of the regular ferry.

6. "Another species of disturbance for which this action is given is, if a person having a right to sit in a particular pew in a church, is disturbed therein, his remedy is by action of trespass on the case."

Gibb. Codex.
321.

This right to sit in a particular pew of a church arises either from prescription, as appurtenant to a messuage from keeping it in repair, or from a faculty from the ordinary; for in him is the disposition of all the pews, except those claimed by prescription.

Stocks v. Booth.
1 T. Rep. 428.

As therefore the disposition of the pews is *prima facie* in the ordinary, in case of any disturbance in the enjoyment of the pew, the plaintiff must make out his title either against the ordinary or against a wrong-doer, by shewing his title by prescription to the pew, as appurtenant to a messuage, or under a faculty from the ordinary.

Kenrick v.
Taylor.
1 Will. 326.

But there seems this difference; that where the action is against a *stranger* for a disturbance, the plaintiff need not state nor prove *repairs*, it is sufficient to lay his title generally, as appurtenant to a messuage. But where the action is against *the ordinary*, he should shew both prescription as appurtenant to a messuage and repairs; for in this case the plaintiff declared on his right to the pew, as appurtenant to an ancient messuage, and that he, &c. had used to repair it, but no repairs were proved; and the first was held to be sufficient, the defendant being a stranger.

Stocks v. Booth,
ante.

But an uninterrupted possession for sixty years will not give a title, if neither a faculty or prescription appears.

Griffith v.
Mathew.
5 T. Rep. 297.

But in this case it was held, that uninterrupted possession for 30 years, unexplained, is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer.

Buxton v.
Bateman.
1 Lev. 71.
1 Sid. 201, S. C.

It seemed in this case, that the declaration ought to state repairs; but that the want of it would be cured by a verdict.

7. The last species of disturbance which I shall consider, is that of *Offices*.

Earl of Montague v. Lord Preston.
2 Vent. 171.
* [644]

* 1. If any person has a title to any office, from whence fees or profits are derived, and he is disturbed in that office, he shall have an action on the case for such disturbance.

But

But the plaintiff in such action must shew that it was an office in fee, and had fees annexed to it: for if an office is not of that nature, there is no injury; and so no action will lie.

Harvey v.
Newlyn.
Cro. Eliz. 859.

2. The principals of the several offices belonging to the courts, have not a power of turning out their clerks at pleasure, unless in cases of misbehaviour or misconduct: and in this case an action on the case was adjudged to lie against the defendant, who was *custos brevium*, at the suit of the plaintiff, who was one of the under-clerks, and turned out of his employment by the defendant his principal, without any sufficient reason or fault.

Whitechurch v.
Paget.
1 Sid. 74.

4. INJURIES TO PERSONAL RIGHTS, NOT PROPERLY REDUCIBLE TO ANY OF THE FOREGOING HEADS.

These injuries may be divided into, 1. Such as affect a man standing in some relation to others: 2. Where there is no relation.

Injuries affecting a man as standing in some relation to others, may be divided into such as affect him in the several relations, 1. Of an husband: 2. Of a father: 3. Of a master.

1. Of Injuries affecting a Man in the Relation of an Husband.

1. "If any person entices away *the wife of another to live apart from him, without sufficient cause*, the husband may have this action for the injury."

As where the plaintiff declared that his wife, unlawfully and without his consent, had departed from him and lived apart, during which time a considerable real and personal estate had been devised to her, to her sole and separate use, and that thereupon she was desirous of returning, and again cohabiting with him, but that the defendant enticed her, and persuaded her to continue absent; by which means she continued absent till her death, whereby he lost the comfort and society of his wife, and the advantage he ought to have had from such a real and personal estate after a verdict for the plaintiff, and 3000*l.* damages, it was moved in arrest of judgment, that this was an action *prima impressionis*: but the Court said that every action on the case was in itself a novelty: no action lies without damages, and the *per quod* will not be alone sufficient, except the act done be unlawful: but though a bare enticement will not be sufficient nor actionable, yet the jury, under the direction of the judge, are judges of the legality. And as receiving the servant of another *scienter* is a ground for an action, *à fortiori* it is so in the case of an husband: and injuries that are within the nature of

Winsmore v.
Greenbank.
Mich. 19 G. 2.
C. B.
Bull. N. P. 73.

TRESPASS ON THE CASE.

of spiritual cognizance, if attended with temporal damages, are actionable.

Grey v. Livezey.
Cro. Jac. 501.

2. If in consequence of an enormous battery of his wife, or any other bodily injury done to her, the husband is deprived of her society and assistance, he may have a particular action for the injury, and declare for a *per quod servitium amisit*.

Hyde v. Scyffor.
Cro. Jac. 538.

And the ground of the action being the loss of the wife's company, not the injury to the wife herself, she need not join in the action.

2. Of Injuries to a Man as standing in the Relation of a Father.

Tullidge v.
Wade.
3 Wilf. 18.

1. An action will lie at the suit of the father *for getting his daughter with child*.

Postlethwayte
v. Parks.
3 Burr. 1878.

But the daughter should be at the time resident in her father's house, or the action will not lie. In this case Lord Mansfield held, that she should be under the age of 21 years; but in the case of *Tullidge v. Wade*, it was held to be no objection, the daughter being above that age.

Bennett v.
Allcott.
2 T. Rep. 166.

And the point was expressly decided in this case, that the action lay though she was above 21 years, and that no *contract of hiring* need be proved, if she in any way appeared to have acted as a servant.

But note; This offence is properly sued, not in this action, but in trespass *vi & armis*, the father considering the daughter as his servant, and declaring for an assault with a *per quod servitium amisit*. But the cases are inserted here for the sake of uniformity; and it seems doubtful whether this action would not lie, it being an act unaccompanied with force, and the damages being given for the consequential injury, the loss of reputation, &c. to the family. This was recognized in the case above of *Tullidge v. Wade*, where it was attempted to set aside the verdict for excessive damages.

And *per Buller*, Just. 2 Term Rep. 167. an action merely for debauching a man's daughter, by which she loses her service, is an action on the case. *Vide 2 Ld. Raym. 1032.*

Gray v. Jeffries.
Cro. Eliz. 55.

* [646]

* 2. A father cannot maintain this action for an *excessive battery of his son*, and the subsequent injuries arising from it, as that he could not marry him as before.

Jones v. Brown.
Esp. N. P.
Cal. 217.

But a father may maintain an action against a person for beating his son, with a "*per quod servitium amisit*." And in such case actual service need not be proved; it is sufficient if the son lived in his father's family.

3. Of Injuries to affect a Man as standing in the Relation of a Master.

1. If any person *inveigles away the servant or apprentice of another*, and prevails on him to quit his service, it is an injury for which this action lies. Hambleton v. Vere.
2 Saund. 169.

But in such case the person hiring must *have notice*, that the servant was then in the service of another, and not discharged; for otherwise he might hire the servant, ignorant of the circumstances, and so would do no injury, unless after notice he refused to discharge him. Anon.
Winch 51.
F. N. B. 390.

2. So it will lie for keeping him after notice.

For it is no excuse for the defendant, who has hired the plaintiff's servant, to say that *he did not entice him away*, but that the servant came away *of his own accord*, and hired with the defendant, if the defendant had notice that the servant had so deserted the plaintiff's service, and yet he still retained him. Fawcett v. Beavres.
2 Lev. 68.

In this case the same point was resolved as in the last case; and further, That though the second master, (the defendant,) who had ignorantly hired him, (the servant,) on discovering that he was the servant to the plaintiff, desired him to return, but the servant refused, and the second master still retained him. He was held to be liable to this action, for he should have discharged him. Blake v. Lanyon.
6 T. Rep. 221.

3. A *journeyman* in any trade is a servant while in the employment of the master-tradesman; and an action lies for enticing him away, even though such journeyman worked only by the piece, and for no certain time. Aldridge v. Hart. Cowp. 54.

4. But where a person was so hired to work at a trade for a limited time, *under a penalty not to discover the secrets of his master's trade*, but having quitted his place, *the master sued him, and recovered the penalty*; this was held to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service. Bird v. Randall.
3 Burr. 1345.
2 Black. Rep. 387. S. C.

5. "In general, if by any injury received from any person, a servant is *disabled in his service*, the master may recover damages for *such loss of service*, by this action."

As if a person digs a ditch in the highway, in which a man's servant falls and breaks a limb, the master may recover in this action for the injury for the loss of service; and so of other injuries of the same kind. 1 Roll. Abr. 93.

But

Taylor v. Neri.
Espin. N. P.
Caf. 386.

But a *public performer at the theatre* is not such a servant to the manager, that the latter can maintain an action for beating him on the case, *per quod servitium amisit*.

2. Of Injuries to Personal Rights which a Person may receive, without Relation to others.

[647]

1. " If any person stands candidate for any elective office, and the returning officer *refuses him a poll*, and " returns another, trespass on the case lies against such " officer."

Sterling v.
Turner.
3 Lev. 50.
1 Vent. 25.
S. C.

As where the plaintiff declared that he was candidate for the office of bridge-master within the city of *London*, and that the defendant as mayor should hold the poll, and that he refused a poll to the plaintiff; the plaintiff recovered in this action: and it was further resolved, that it need not be averred in the declaration that the plaintiff would have been elected.

Ashby v. White.
Salk. 19.

2. If a person who is entitled to *vote at any election* for members of parliament, *tenders his vote* to the returning officer, *which he refuses to admit or allow*, he is subject to this action at the suit of the voter. For, per *Holt*, the right of voting is a noble privilege, of which by this means he is deprived.

Bagg's case.
11 Co. 99.

3. If any returning officer holds an election, or is called upon to make any return, wherein the right of a third person is concerned, and *he makes a false return* to such writ on such election; as a sheriff of members to parliament, a mayor of a corporation to a *mandamus*, &c. an action on the case in these instances lies against them.

Prideaux v.
Morris.
Salk. 502.

Where the right of a seat in parliament has been decided in favour of the person not returned by the returning officer, or where it could not be decided; as where the parliament was dissolved; an action at common law lies against the returning officer, but not otherwise. N. B. In 1 *Wilf.* 127. Ch. J. *Willes* denied this case to be law. *Sed quære?*

But a farther remedy is now given by statute 7 & 8 *W.* 3. 7. which enacts, " That if any sheriff or other officer " makes a false return of members to serve in parliament, " the party injured (that is, he who should have been re- " turned) shall recover double damages and costs."

Sir Watkins
Wynne v.
Middleton.
1 *Wilf.* 125.
2 *Stra.* 227.
S. C.

1. An action lies in pursuance of this statute *in all cases* of a false return, not solely where there has been a resolution of the house of commons deciding the right to the seat.

2. The

2. The statute is not merely penal, but is also a remedial s. c. one; on which ground an amendment was allowed.

3. By the same statute, a return contrary to the last resolution of the House of Commons, shall be deemed a false return; and so subjects the officer to this action. And by § 3. a return of more persons than are required by the writ or precept to be chosen, in like manner subjects the returning officer.

* 4. As to the case of *mandamus*, the return was formerly absolute, and so an absolute injury was done to the party, and therefore this action was given to him for redress; but now by statute 9 *Ann. c. 20.* the party may traverse the return, and is not put to his action. ^{2 Black. Com. 111.} * [648]

Note; An action for a false return must be brought either in *Middlesex* where the return is, or in the county from whence it is made. ^{Bull. N. P. 62.}

2. "If the King grants a *patent* for the sole use of any invention, and the patent be good in law, an action lies against any person for infringing it."

1. "If the action is brought by the patentee, it is incumbent on him to shew, 1st, That the invention was new: 2dly, That the specification is full and complete; that is, such as that the public, after the term of the patent is expired, may have the benefit of, and be able to do without further instructions the thing for which the patent is granted."

1st, *The invention must be new.*

This is under statute 21 *Jac. 1. c. 3.* which declares all monopolies to be illegal, but allows letters patent for fourteen years for the sole working and making of any manner of new manufactures within the realm, to the true and first inventor, so as such be not contrary to law, mischievous to the state, by raising the price of commodities at home, hurt of trade, or generally inconvenient.

And as a grant of monopoly or patent may be to the first inventor, by stat. 21 *Jac. 1. c. 3.* so if the invention be new in England, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of new manufactures within the realm; so that if they be new here, it is within the statute; for the act intended to encourage new devices useful to this kingdom, and whether learned by travel or by study, it is the same thing. ^{Edgesherry v. Stephens. 2 Salk. 447.}

"But the whole of the machine for which the patent is granted, need not be new."

For

Morris v.
Branson.
Sitt. Westm. E.
1776.
Bull. N. P. 76.

For where the question was, Whether an *addition* to the old stocking-frame was the subject of a patent? Lord *Mansfield* said, that if the general question of law, viz. that there can be *no patent for an addition*, be with the defendant, that was open on the record, and he might move in arrest of judgment; but that that objection would go to repeal almost every patent that ever was granted: there was a verdict for the plaintiff, and 500*l.* damages; which was acquiesced in.

Per Buller Just.
Rex v. Elfe.
Sitt. West.
Mich. 1785.
Bull. N. P. 78.
last edit.

* But in such case the patent must not be more extensive than the invention; therefore if the invention consists of an addition or improvement only, and the patent is for the whole machine or manufacture, it is void.

* [649]

2dly, "So the *specification must be full and complete in every respect*, as the public are to have the benefit of the discovery at the expiration of the patent."

Rex v. Arkwright.
Sitt. West.
Trin. 1785.
Bull. N. P. 78.
last edit.

On a *scire facias* to repeal a patent, four issues were joined on the record: 1st, That the patent was inconvenient to his Majesty's subjects in general: 2dly, That the invention at the time of granting the patent was not a new invention as to the public use and exercise of it in *England*: 3dly, That it was not invented and found out by the defendant: 4thly, That the defendant had not by his specification particularly described and ascertained the nature of the invention, or in what manner the work was to be performed. It was laid down by Justice *Buller*, 1st, That a man to entitle himself to the benefit of a patent, must disclose the secret and specify the invention in such a way that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new addition or invention of their own: 2dly, He must describe it so that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it; and therefore if the specification describes many parts of an instrument or machine, and the patentee himself uses only a few of them, or does not state how they are to be put together and used, the patent is void: 3dly, If the specification be in any part materially false or defective, the patent is against the law, and cannot be supported.

Liardet v.
Johnson.
Sitt. Westm.
Hil. 1778.
Bull. N. P. 79.

Therefore in a case for infringing the patent for making steel trusses for ruptures, the patentee in the specification omitted what was very material for tempering the steel, which was rubbing it with tallow; Lord *Mansfield* held the patent to be void.

"So if the specification is in any respect *ambiguous or unintelligible*, or contains matter not in the thing for which the patent is granted, it is void."

As where the action was for infringing the plaintiff's patent for making patent-yellow; at the trial three objections were taken to the patent: 1st, That after directing that *lead* should be calcined, it directed another ingredient, namely, *minium* to be taken, which would not answer the purpose, as it did not say whether it was to be calcined or fused, and by reference to the preceding words it would be to be calcined, which would not answer, as fusion was necessary: 2dly, That it directed any kind of fossil-salt to be taken, whereas only one kind of fossil-salt, namely, *sal gem*, would answer the purpose, because it must be a *marine salt*: 3dly, That all the things together did not produce the effect; for that the patent was to do three things, but this produced one only: These were held to be decisive objections to the patent, and that it was void.

Turner v.
Winter.
1 T. Rep. 602.

[650]

3. This action was adjudged to lie against the defendant, who was the lessee for years, for preventing the plaintiff who had the reversion in fee, from coming on the lands to see if there had been any waste committed, and this though it was not shewn that any waste had been done.

Hunt v.
Downman.
Cro. Jac. 478.

So case in the nature of waste lies against tenant for years, whose term is expired, though there was a *covenant in the lease* not to commit waste.

Kinlyside v.
Thornton.
2 Black. Rep.
1111.

4. This action lies at the suit of a parishioner, for *excluding him from the vestry-room*; but it must be averred that the parish had a property in the room, and a right to meet there, or otherwise it might be taken to be the defendant's own room, to which he might only admit whom he pleased.

Phillybrown v.
Ryland.
1 Stra. 624.

5. "Where any consequential injury arises to another from a breach of trust, the remedy is by action on the case."

As where the plaintiff declared that he was a wheeler, and possessed of several tools relating to his trade, viz. an ax, &c. and by licence of the defendant deposited them in his house; that the defendant had detained them after request for two months, whereby he lost the advantage of his trade for that time; the plaintiff had a verdict; and it was moved in arrest of judgment, that the action should have been trover or detinue: but the Court held the action well brought; for if the plaintiff had his goods again, detinue would be improper; and though a detainer upon request is evidence of conversion, yet it is not a conversion, and the demand in this case being special, the action ought to be so too.

Kettle v. Hunt.
Mich. 27.
Car. 2. C. B.
Bull. N. P. 78.

"For it is no objection to this action that another will lie for the same offence."

Pitts v. Gaince
& al.
Salk. 20.

[651]

As where the plaintiff declared that he was master of a ship, which, being laden and ready to sail, was seized by the defendants, whereby he lost the profits of his voyage; it was objected that the action should be trespass *vi et armis*; but *per Holt*, the plaintiff declares not as owner, but as an officer for particular loss, and for it in this action he shall recover, though he might have had trespass on the possession: but the plaintiff does not declare for the tort itself, (the seizing of the ship,) but for the consequential injury, the loss of the voyage.

3. OF THE PLEADINGS AND EVIDENCE.

1. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1. "The declaration in this action should state *the particular manner* in which the injury complained of has been committed."

Rigg v. Clark.
Cro. Eliz. 194.

For where the action was for overloading the plaintiff's horse, whereby he was injured, without shewing how he was overburdened, the declaration was for that held to be bad.

2. "Though the declaration goes for a longer time than the injury complained of entitles the plaintiff to a remedy for, yet if he is so entitled *for any part* of the time laid, he shall recover accordingly."

South v. Jones.
1 Stra. 245.

As where the plaintiff declared against the defendant as parson, for not taking away his tithes when set out, but suffering them to lie, to the injury of the plaintiff's grafs, *from August the 20th (the day when the grafs was cut) to the 10th of December following*: though the declaration demanded damages from the time of cutting, which was wrong, as the parson was not obliged to take the grafs away till it was made into hay; yet for part of the time, the plaintiff having received an injury, he should recover *pro tanto*.

Walker v.
Griffiths.
Mich. 5 Geo. 2.
Bull. N. P. 67.

3. In declaring on *escapes*, if the party escaped out of custody in *Essex*, and be seen abroad in *Hertfordshire*, the plaintiff may lay his action in *Hertfordshire*.

Miner v.
Hinton.
Cro. Car. 329.

And if the plaintiff declares for an escape against the defendant as *baileff* of a liberty, he ought to shew that the defendant had *execution and return of writs*.

In an action for an escape, it must appear that the *committal was of record*.

Wightman v.
Mullins.
1 Stra. 226.

For where in an action against the marshal, it was laid that the prisoner was brought before Sir *W. Chappel*, one of

of the justices of our lord the King, and was then committed to the custody of the marshal, at the suit of the plaintiff, on demurrer it was held ill: for it did not appear that the commitment was of record; before which time he is not in the marshal's custody.

[652]

If an executor brings a *sci. fa.* on a judgment to his testator, and has a judgment on it, whereupon a *ca. fa.* issues, and the defendant being taken, escapes; in the declaration against the sheriff, the plaintiff may declare briefly on a *sci. fa.* and judgment thereupon; but if he declares that he sued out a writ without setting out any judgment, it is an incurable fault.

Gold v. Strode:
Carth. 140.

So an administrator may maintain an action in his own name for an escape of a prisoner, who was in execution on a judgment obtained by himself.

Bonafous v.
Walker.
2 Term Rep.
126. 2 Ref.

4. Where the plaintiff declared against the defendant, an attorney, for negligence in not signing a judgment in a cause wherein he had been attorney to the plaintiff, and having set out in his declaration the writ under which the defendant in the original action had been arrested, he misrecited it; it was held to be fatal.

Green v.
Rennet.
1 T. Rep. 656.

5. In declaring against a common carrier, it is sufficient to declare in general on the custom and undertaking, without setting out any sum which the plaintiff was to have paid for the carriage, but merely stating it "for reasonable hire;" for the carrier may recover on a *quantum meruit*.

Bastard v.
Bastard.
2 Show. 81.

6. If a commoner declares against another person, whether commoner or not, for an injury to his common, he should state the offence to be "that his common, *tam amplo modo habere potuit sed proficuum suum, inde per totum tempus amisit*"—for such injuries only may he have an action.

9 Co. 113.
Vid. ante, 361.

And such general declaration, for destroying the grass *per quod proficuum*, &c. is good without setting out "that defendant claims a right of common;" for that should be pleaded either by the defendant himself, or given in evidence on the general issue.

Atkinson v.
Teastale.
3 Will. 278.

But in this action, if against the lord of the soil, the declaration should as against him state a surcharge and the particular injury.

3 Will. 290.

So the plaintiff in his declaration against a stranger need state no title in himself, for possession is sufficient against a wrong-doer; and the disturbance being the gift of the action, and the title only inducement, it cannot be traversed except the defendant sets up a title in himself and justifies; in which case the plaintiff in his replication must set out his title.

4 Mod. 424.

[653]

Johnson v.
Long.
1 Salk. 10.

7. Where a *nuisance* has been continued after a former recovery in an action for the same, the plaintiff must declare for a continuance of the nuisance; for if he declares barely for a nuisance, the former recovery is a good plea in bar.

Vernon v.
Goodrich.
1 Stra. 5.

8. Wherever the action is for a *disturbance* to an easement; as where a person claims a watercourse over the lands of another, if the action is *against the tenant of the freehold* for the disturbance, the declaration should shew a right in the plaintiff either from a grant or by prescription; but if it does not appear that the land over which the easement is claimed is the defendant's freehold, it is sufficient in the declaration to state the injury only; but then if the defendant in his plea sets out a right, the plaintiff must not demur, but set out his.

Anon.
Cro. Car. 499.

But in declaring against the defendant for turning a watercourse, it is good to state it as an *ancient watercourse*, which has been accustomed to run to the plaintiff's mill, without setting out any prescription; for those words are tantamount.

Dent v. Oliver.
Cro. Jac. 43.

9. In declaring for a disturbance of the plaintiff's *fair*, it is not necessary to set out any title either by grant or prescription.

Brucker v.
Fromont.
6 T. Rep. 659.

10. Where the declaration charged the plaintiff "that he so negligently drove his cart, that he violently drove against the plaintiff's horse, by which he was killed;" it was held good evidence, that the cart was driven by the defendant's servant, though he was not present when the accident happened.

Savignac v.
Roome.
6 T. Rep. 125.

In a declaration against the master for an injury done by the servant, stating that he *wilfully* drove against the plaintiff's carriage, it is bad. For such injuries *so* done trespass *vi & armis* lies.

Day v. Edward.
5 T. Rep. 648.

So where the declaration stated that the servant furiously drove, &c. it was held bad on the same ground.

11. "In this action the day laid in the declaration is not material, provided the plaintiff can prove the injury for which the action is brought to have been committed any time before the bill filed."

Foster v.
Bonner.
Cowp. 454.
Best v. Wilding.
7 T. Rep. 4.

As where the plaintiff declared for an injury to an ancient ferry of which he was possessed, he had sued out his *latitat* on the 22d of *August*, and declared for the defendant carrying over passengers on the 17th of *August*, but at the trial could not prove the carrying of any persons till the 25th of *September*; and a case being reserved, whether such evidence supported the declaration, being after the time of suing out the *latitat*? the Court held, that evidence of the injury

injury any time before the bill filed, which was in *Michaelmas* term, was good.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. "The general issue in this action is not guilty; and upon it the defendant may give in evidence any matter which destroys the plaintiff's action; for the declaration charging a particular injury or offence, *not guilty* denies such injury or offence." [654]

As in case for beating plaintiff's servant, *per quod servitium amisit*, defendant upon *not guilty* may give in evidence, that plaintiff *did not lose his service*; for that is the injury charged and denied by not guilty.

Duel v. Harding.
9 G. 1. per
Raymond.
Bull. N. P. 78.

2. "So under the general issue, the defendant may give a justification in evidence, for if he is charged with that as an offence which is a lawful act, he is not guilty."

As where the trespass laid was for beating the plaintiff's horse, *per quod* he lost the use of him for several days, the defendant pleaded not guilty, and he was allowed to give in evidence that he kept a shop, and that the plaintiff put his horse and cart so directly before the defendant's door, that the customers were prevented from coming to his shop, wherefore he whipped the horse away; and the defendant had a verdict.

Slater v. Swann.
2 Stra. 372.

3. In the case of escapes, by stat. 8 & 9 W. 3. c. 26 § 26. "The marshal or warden of any prison shall not in any action for an escape against them give in evidence a re-taking upon fresh suit, *except the same be specially pleaded*; nor shall any special plea be received, unless oath be made in writing by the marshal or warden, and filed, that the prisoner did, without defendant's knowledge, privity, or consent, make such escape."

In an action against the warden or marshal, an affidavit under the statute, that the escape, "if any such escape there was, was without defendant's knowledge," is good with these words.

West v. Eyles.
2 Black. Rep.
1059.

If plaintiff in his declaration sets out a voluntary escape, defendant may plead that he took the party on fresh suit, without traversing the voluntary escape; for the alleging it is nowise necessary to his action, but it should come in the replication: so under a count for a voluntary escape, the plaintiff may give a negligent one in evidence.

Sir Ralph Boyce's case.
1 Vent. 211.
Bonafous v. Walker.
2 T. Rep. 126.
3 Ref.

And note; That actions for escapes being founded in *maleficio*, are not within the statute of limitations.

Jones v. Pope.
2 Lev. 191.

Bull v. Steward.
1 Will. 235.

The defendant, in an action for an escape, shall never be allowed to plead or give in evidence that the first suit was improperly commenced; for as he could justify under the process, he shall not be allowed to take advantage of any irregularity.

Nevill v.
Hamerton.
1 Lev. 61.

* [655]

4. By statute of *West.* 2. c. 46. "A commoner may take in part of the common for a dairy, sheep-cot, or curtilage." * It is therefore a good plea to an action against a commoner for inclosing part of the common, that he did it for some of these purposes. But it should appear by the plea that such inclosing was for his own use, or for his servant or shepherd.

5. "Where either party in this action prescribes for an easement, the other cannot set up a contrary prescription without a traverse of that set up by the other."

Murgatroid
v. Law.
Carth. 117.

For where in an action against the defendant, for diverting an ancient watercourse, he pleaded that he was seised of two closes, through which the water ran, and that he, and all those whose estate he had, used to water their cattle there in said water, "but that, for convenience of watering, they had a right to dig a ditch near the said watercourse," and so concluded without a traverse: this being a prescription varying the first, was held to be bad without a traverse.

Spooner v.
Day & al.
Cro. Car. 432.

So where the plaintiff declared, that he was entitled by prescription to a fold-course for his sheep in certain lands, and that the defendant had inclosed them, the defendant pleaded a contrary prescription to inclose, and held bad on demurrer for want of a traverse.

Mitchell v.
Tarbutt.
5 T. Rep. 649.

6. Where there are several part-owners of a ship, in an action against them on contract, all should be joined; *aliter*, if on a tort, in which case an action will lie against part. *Vide ante*, S. C. 623.

4. OF THE EVIDENCE.

1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

And, 1st, "In all cases of this action it is necessary that the evidence should so apply to the offence or injury charged, that by no presumption such offence or injury can be supposed to arise from any other cause."

Harding v.
Bodman.
Hutt. 11.

For where the plaintiff declared, that the defendant, in giving evidence in an action between the plaintiff and another person, had used words in derogation of the plaintiff's character, whereby the jury gave him but small damages in that action; this action was held not to lie, for it could

could not appear how the jury were influenced in their verdict by those words.

2. "In trespasss on the case, all *material averments* only are put in issue, and nothing more; and these only are required to be proved."

Therefore where the plaintiff in an action against his tenant of certain lands, for leaving them out of tenantable repair, declared, first as *seised in fee*, and it was proved that he was only *tenant in tail*, yet it was held not to be a material variance, because that the lease of tenant in tail is not void, but voidable only by the issue in tail, and could not be avoided during the lessor's life. 2d, Where he declared "that the tenant had undertaken to leave it in tenantable repair," and it was proved to be, "to leave it in good repair as the tenant found it;" it was held not to be a variance, the land being proved to be in tenantable repair when the tenant entered.

"For this action, being in its nature transitory, material averments only are put in issue."

Therefore in case for negligence in running down the plaintiff's boat, near the half-way reach in the river *Thames*, the evidence proved it to have been done in the half-way reach: this was adjudged not to be a material variance.

So where the action was on an agreement to procure the plaintiff a booth at a horse-race on *Barnet Common*; the declaration stated *Barnet Common* to be in the county of *Middlesex*; in evidence it was proved that the whole of *Barnet Common* was in *Hertfordshire*; and the objection of a variance being taken, Lord *Mansfield* and the rest of the Court (on a motion for a new trial) held, that the gist of the agreement being to procure the plaintiff a booth at *Barnet Common*, it was immaterial whether it was in *Middlesex* or *Hertfordshire*, and so that the words might be rejected in the declaration.

3. In escapes, if the plaintiff declares that he had a good cause of action against *J. S.* and sued out a *latitat* against him, and that the defendant arrested him, and suffered him to escape, he must prove a cause of action, or he will be nonsuited, though the cause of action need not be for the same sum mentioned in the declaration; but if the declaration be of a *latitat* in a plea of trespass, and the writ produced be of a plea of trespass *et etiam billa* 20l. it will not support the declaration.

2. Plaintiff in an action for an escape need neither produce the *ca. sa.* nor the copy of it, but the return is sufficient; neither need the *ca. sa.* be set forth in the declaration. But if it be set forth with a *scilicet* that issued such a day, it may

Winn v.
Walker.
2 Black Rep.
840.

[656]

Dunlop v.
Twiss.
4 T. Rep. 558.

Frith v. Gray.
H. 7 G. 3.
quot. per Grose,
Just.
4 T. Rep. 562.

Gunter v.
Clayton.
2 Lev. 85.
Alexander v.
Macaulay.
1 T. Rep. 611.
Decided on the
authority of the
above case.

Tildar v. Sutton.
Palch. 2 And.
per Holt, John-
son v. Gibbs,
per Holt, at
Exon.
Bull. N. P. 66

be doubtful whether he ought not to prove the *ca. fa.* with a true teste; otherwise, against the sheriff the warrant to the bailiff is sufficient evidence, though it would not be so for him.

Rex v. Ford.
2 Salk. 690.

3. To prove a voluntary escape, the party escaping may be a witness; for it is a matter of secrecy between him and the gaoler.

Ld. Raym. 190.
* [657]

* So is the confession of the under-sheriff good evidence to charge the sheriff, for in effect it charges himself.

Blatch v. Archer.
Cowp. 63.
Vide M'Neal v.
Perchard.
Espin. N. P.
Cas. 263.

In an action against the sheriff for an escape, the return of *non est inventus* on the writ is sufficient proof of the delivery of the writ to the sheriff, and the bailiff's name indorsed is sufficient proof that a warrant was directed to him.

Wilson v.
Geary.
6 Mod. 211.

4. If the action is brought for a *rescue*, the plaintiff must prove, 1. The original cause of action: 2. The writ and warrant, which must be by producing sworn copies: 3. The arrest to shew it is legal: 4. In point of damage it is expedient to prove that the person arrested has become insolvent, or is not to be found; but this is not *necessary* to support the action; for the defendant having been guilty of a breach of the law, shall find no favour.

Kempland v.
Macaulay.
Peake's N.P.C.
65.

5. In an action against a sheriff for a false return to a writ of *fi. fa.* it is necessary for the plaintiff to prove the real existence of his debt upon which the writ issued; but proof of an acknowledgment by the defendant that he was so indebted to the plaintiff is sufficient.

Jarvis v. Hayes.
2 Stra. 1083.

5. In an action *against the master* for an injury done by the servant, the servant is an inadmissible witness unless he shews a release from his master; for if the plaintiff recovers against the master, the servant is liable over to him for his own misconduct; and if the plaintiff fails against the master, he may sue the servant, so that either way he is *interested*.

Green v. New
River Company.
4 T. Rep. 589.

So where the action was against the master for negligence in the servant, who was a turncock to the defendants, in not stopping a pipe, by the bursting of which the plaintiff's horse received an injury; the servant was called as a witness, but was objected to as incompetent without a release, as he came to disprove his own negligence, which, if established by the verdict, would be a ground of action against himself by his employers; and he was rejected on that ground: for the verdict which the plaintiff would obtain against his masters, might be given in evidence in an action by them against him, to ascertain the quantum of the damage,

damage, though not as to the fact of the injury, that he being therefore interested to diminish those damages, was an incompetent witness.

"But where the injury is done in the master's company, and not by the servant alone, there he is a good witness."

Therefore in an action against the master, for that by the negligently managing his barge he had run down that of the plaintiff, *Lee*, Ch. Just. examined all the men to prove no neglect, the master himself being then asleep in the cabin. Bull. N.P. 77.

"But where the action is by the master for an injury done to the servant, with a *per quod servit. amisit*, there the servant may be in evidence (though the case of *Dunsley v. Westbourn*, 1 Stra. 414. is *contra*) from the authority of the following cases." [658]

The servant beaten was in this case allowed to be a good witness on an action brought by the master. *Duel v. Harding*. 1 Stra. 595.

So in an action for defendant's dog having bit the plaintiff's apprentice, *per quod servit. amisit*, the apprentice was admitted as a witness. *Lewis v. Fogg*. 2 Stra 944.

So where the action was for debauching the plaintiff's daughter, the daughter was examined as a witness. *Cock v. Watham*. 2 Stra. 1054.

This was admitted in the case of *Reddie v. Scoolt*, *Peake's N. P. Caf.* 241.

For in these actions the servant is no way interested in the event, the action being given to the master, not for the injury, but for the consequences of the injury.

6. In an action against a *carrier*, the plaintiff ought to prove that the defendant used to carry goods for hire, and that the goods were delivered to him or his servant to be carried; and if a price be alleged in the declaration, it ought to be proved to be the usual price of such a stage, but there needs no proof of a price certain; and if a price be proved, there needs no proof that defendant is a common carrier, *for every one carrying for hire is deemed so in law*. Per Holt, at Horsham. 13 W. 3. Bull. N.P. 73.

So where the plaintiff declared against the carrier, on his undertaking to carry for a certain price to be paid by the *consignor*, and on evidence it appeared that it was to have been paid by the *consignee*, it was held to support the declaration. *Moore v. Wilfon*. 1 T. Rep. 659.

"Where the question turns upon whether the goods were delivered to the carrier or not, this case has been decided

“ as to the competency of the person delivering them being
“ a witness.”

Davies v.
Phillips.
G. Hall. Sitt.
Hil. 16 G. 3.
MSS.

In an action against a carrier for the loss of goods delivered at the inn-yard, the defence was that they were never delivered there, or if so, that it was to a sharper who had gone off with them : to prove the delivery, the plaintiff called the person from whom he had bought the goods, and who had delivered them at the inn ; he was objected to, because if the plaintiff did not recover in this action, and the goods were not properly delivered, he would be liable to the plaintiff : to this it was answered, that the plaintiff having adopted the delivery, could never after call on the witness : but

[659]

per Lord Mansfield, the question is, Were the goods delivered at the inn or not ? if they were not properly delivered, or embezzled by the witness's servants, in either case he is liable to the plaintiff, therefore he is interested and inadmissible.

Wails v.
Watling.
2 Black. Rep.
1233.

7. If the plaintiff's action is for a surcharge of his common, he need not shew that he had actually turned any cattle on the common at the time of the surcharge laid ; it is sufficient to shew that by the number turned in by defendant, he could not have enjoyed his common in so ample a manner as he was entitled.

Hobson v. Food.
4 T. Rep. 71.

And in such case it is no defence to the action that the plaintiff himself had surcharged the common, for that is a tort for which he is himself liable to an action ; and one tort cannot be set off against another.

Lord Montague
v. Lord Preston.
1 Vent. 171.

8. If the action is for disturbing the plaintiff in taking the profits of an office, it is sufficient to prove the value, *communibus annis*, not every particular sum received.

2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

Rex v. Fell.
1 Salk. 272.

1. In the case of escapes, the gaoler or officer can take no advantage of the error in the process ; and so if he pleads no escape, it seems he shall not be allowed to give in evidence that there was no arrest ; for the plea admits the arrest.

Wilson v. Ceary.
6 Mod. 211.

2. In cases of rescue, the defendant may give in evidence, in mitigation of damages, the ability of the person rescued, and that he is still amenable to justice ; yet if the jury give the whole debt in damages, no new trial will be granted. And in this case the party rescued may be an evidence, and though *particeps criminis*, if the defendant be guilty, yet shall this only go to his credit, not to his competence.

3. In

3. In an action for a *false return of non est inventus* on mesne process, the sheriff's bailiff is an inadmissible witness to prove an endeavour to execute the writ, for he has given security to the sheriff, so that it is his own cause in effect.

Powel v. Hord.
1 Stra. 649.

In an action for surcharge of common, the plaintiff must claim his right of common by prescription for cattle levant and couchant, as *appurtenant to land or curtilage*; for where he claimed it as appurtenant to a *messuage*, it is bad; for to an house only common cannot be appurtenant.

Scholes v.
Hargreaves.
5 T. Rep. 46.

Where to an action of trespass defendant pleaded a custom for all the customary tenants to have a right of common, and then claims title as tenant of such customary tenement, and the replication traverses the custom; the plaintiff may, *on this issue*, prove that the messuage was built within twenty years, and not upon the site of an ancient messuage.

Dunstan v.
Trefider.
5 T. Rep. 2.

5. THE VERDICT, JUDGMENT, AND COSTS.

1. It seems a general description of the verdict in this action, that if the substance of the issue is found it is sufficient.

As where in an escape the plaintiff declared on a taking by the defendant, the then sheriff, and it appeared that he had been taken by a former sheriff, but *handed over in custody* to the defendant, the issue was held to be well found.

King v.
Andrews.
Cro. Jac. 380.
[660]

So where the declaration in escape alleged that the prisoner was surrendered at the justice's chambers in the parish of *St. Bride*, and it was found to be in *St. Dunstan's*, it was yet held to be good.

Oates v.
Machin.
1 Stra. 595.

So where in a case for disturbing the plaintiff in an office, he made a special title, and the jury found a title variant from that so set out, yet the plaintiff had judgment.

Ferror v.
Johnson.
Cro. Eliz. 33.

And lastly, In a case on the sale and warranty of *two oxen*, and the jury found a verdict as to the sale of *one*; on the variance alleged, the Court over-ruled it, for the action was on the *deceit*, not on the warranty.

Gravenor v.
Meers
Cro. Eliz. 384.

2. In an action against the sheriff for a false return on mesne process, the jury may give the whole debt in damages.

Powel v. Hord.
1 Stra. 649.

TRESPASS ON THE CASE.

OF THE COSTS.

By stat. 2 *W. & M.* *f. i. c. 5.* " Treble costs and damages are given against a person guilty of a rescous of a
" distrefs."

Lawson v.
Storic.
Salk. 205.

If plaintiff brings a case on this rescous, which he might do by common law, he shall recover treble costs as well as treble damages.

PART THE SECOND.

CHAPTER I.

Of Writs of Mandamus.

THE Writ of Mandamus is a prerogative writ, issuing out of the Court of *King's Bench*, by virtue of that general superintendency which that court possesses over all inferior jurisdictions and persons. It is the proper remedy to enforce obedience to acts of parliament and the King's charters: to prevent disorders from a failure of justice and defect of police: every subject is entitled to it on a proper case shewn to the Court, and it ought in all cases to be granted where the law has provided no specific remedy, and wherein by justice and good government there ought to be one.

Per Ld. Mansfield.
3 Burr. 1267.

Writs of mandamus, as far as respects corporations, according to their object, are either to restore a person deprived of some corporate, or other franchise or right, or to admit a person legally entitled to the same rights.

In treating of the proceedings under this writ, I shall, 1st, Consider for what the Court will grant a mandamus: 2dly, For what the Court will not grant a mandamus: 3dly, The proceedings in granting it: 4th, Of the writ itself: 5th, Of the proceedings under the stat. 9 *Ann.* 26.

I. FOR WHAT THE COURT WILL GRANT A MANDAMUS.

1. A Mandamus lies to admit or restore Persons to every Description of Corporate Offices.

As mayor, burghers, common-council-man, recorder, town-clerk, alderman, bailiff, and such offices as are part of or belong to corporations.

Raym. 431.
1 Sid. 14.
5 Mod. 257.
Stil. 32.
4 Burr. 1999.
1 Vent. 77.
Poph. 176.
Cro. Jac. 506.
Stil. 355.
52 Bullt. 122.
1 Vent. 19.
2 Roll. Ab. 455.

2. It

2. It lies to the Officers of Corporations to do certain Acts connected with their Duty as Corporators.

1 Lev. 91.
Raym. 69.
4 Mod. 368.
Stil. 299.
1 Burr. 117.
1 Stra. 1157.
2 Stra. 1003.
2 Stra. 1080.
1 Stra. 578.
2 Stra. 948.

As to admit persons to offices in the corporation: To admit those having right to their freedom: To call a corporate meeting To hold corporate elections: To the steward of the borough to attend with the corporation-books, &c.

3. To admit or restore Persons claiming Rights or Appointments in Colleges or Corporations of such public Erection.

Raym. 101, 31.
1 Mod. 82.
1 Sid. 29.
Cont. Carth. 92.

As master or fellow of a college, fellow of the college of physicians, &c.

Or calling upon Persons having Authority, to execute their proper Duties in such Colleges, or to do certain Acts belonging to their Appointments.

Cowp. 377.
1 Stra. 557.
2 Ld. Raym.
1334.
3 Burr. 1647.
1 Stra. 58.

As to the warden of a college to put the college seal to an answer in Chancery: To the chancellor of an university to restore a person to degrees: To the keepers of the university seal, to put it to the appointment of high steward: To restore an under schoolmaster to a school of royal foundation, &c.

4. To admit or restore Persons claiming Rights or Offices belonging to any inferior or Ecclesiastical Court.

1 Sid. 94. 152.
2 Lev. 75.
Raym. 56.
1 Sid. 40.
Show. 289.
Mod. Caf. 18.

As attorney to the Marshalsea Court: Steward of courts leet: Clerk of the peace: Registrar of the Ecclesiastical Court, &c.

Or to Persons having Authority therein to do all legal Acts connected with their Duties and Offices.

2 Roll. Rep. 82.
85.
2 Stra. 1207.
1 Wilk. 283.
1 Stra. 113.
Raym. 235.
1 Vent. 335.
1 Sid. 281.
1 Lev. 186.
1 Stra. 552.
1 Vent. 115.
Raym. 439.
Caf. tem.
Hardw. 130.
4 Burr. 2295.
2 Roll. Rep. 107.

As to the lord of the leet to administer the oaths to the *portreeve*: To compel the tenants of the manor to attend at the court leet to make a jury: To the steward and homage of a manor to hold a court, and present purchasers of burgage tenements: To the judge of an inferior court to proceed to judgment on a verdict: To the judge of the ecclesiastical court to grant probate of a will or administration to whom it belongs: To the spiritual court to administer the oath to one elected churchwarden: To the spiritual court to absolve an excommunicated person, &c.

5. To

5. To admit or restore Persons to Benefices or Dignities in the Church, or other Places of Ecclesiastical Function, or to do Acts connected with their Offices.

As to the warden of a college to admit a chaplain: To restore a preacher: To admit, institute, and induct into a canonry or prebend: To admit a parish clerk: To restore a sexton: To swear in a churchwarden: To try the right of officiating in chapels, by admitting a person to the curacy: To trustees of an endowed meeting-house, to admit one as pastor to the use of the pulpit. To admit a vestry clerk, &c.

2 Stra. 798.
3 Burr. 1265.
2 Stra. 1082.
1 Stra. 159.
Cowp. 412.
Cowp. 370.
3 Burr. 1420.
2 Burr. 1043.
3 Burr. 1265.
Rex v. Church-
wardens of
Croydon.

6. To admit or restore Persons claiming the Freedom of or Offices in any Public Company, or to do Acts connected with them.

As director of the Amicable Assurance Company: Aquaker to the freedom of the *Turkey* Company: Yeoman of the wood wharf to the corporation of *London*: Ale-taster: To the clerk of the company to hand over the company's books on his being removed, &c.

1 Stra. 696.
2 Burr. 1000.
2 Stra. 832.
1 Stra. 608.
2 Stra. 879.

7. To Justices of the Peace, to carry into Execution the several Statutes under which they are empowered to act.

As to make convictions: To register a meeting-house: To swear an overseer to his accounts: To grant warrants to levy the balances of old overseers accounts: To make a warrant of distress for a poor's rate: To appoint overseers to a new township or hamlet: To allow constables their charges in providing carriages for the king's forces: To sign poor's rates: To swear in overseers of the highways, or to make a rate to reimburse such surveyors of the highways: To proceed to judgment on a seizure: To take articles of surety of the peace: To receive an appeal, &c.

1 Stra. 530.
1 Willf. 21.
4 Burr. 1991.
1 Willf. 125.
2 Stra. 992.
1 Willf. 133.
1 Stra. 512.
1 T. Rep. 374.
1 Willf. 138.
1 Stra. 42.
Carth. 450.
Cas. temp. H.
128.
4 Burr. 2452.
1 Stra. 211.
1 Stra. 530.
2 Stra. 835.
Bull. N. P. 213.

8. To compel Corporations to proceed to Election under stat. 11. *Geo.* 1. c. 4. s. 2.

Under this head it is to be observed, that the writ of mandamus being for the purpose of enforcing obedience to charters, when the election was ordered to be holden on a certain day, if that day was past, a mandamus could not order the election to be holden on another day, for that would not enforce, but be inconsistent with the charter: it was therefore

therefore necessary to preserve the corporations to remedy that evil; and it was therefore enacted by that stat. "That if
 " no election should be had of the mayor, or other chief
 " officer on the charter-day, that the corporation should not
 " for that be dissolved, but might meet at the town-hall the
 " day after, and proceed to election; and if no election was
 " made on the charter-day, or in pursuance of that act, or
 " being made, should after become void, that the Court of
 " K. B. might grant a mandamus, requiring an election to
 " be made."

Under this statute it has been held,

*Case of Boffi-
 ney, alias Tin-
 tagel.*
 2 Stra. 1003.
*Case of Aberyst-
 with.*
 2 Stra. 1157.
 S. P.

1. That where there was a mayor *elected and sworn into the office*, the Court notwithstanding granted a mandamus, it appearing that the election was *merely colourable*; for the intent of the act was to give the corporation a rightful officer, whereas this pretence would waste the whole year, though the Court might refuse it if there was a probable election.

*Rex v. Mayor,
 Bailiff, and
 Burgeses of
 Cambridge.*
 4 Burr. 2008.

So where the corporation elected for mayor an officer of the army just gone to *America*, and not likely to return within the year, and that known to the electors at the time of the election, the Court held this to be clearly a colourable election, and granted a mandamus to proceed to the election of another.

Rex v. Banks.
 3 Burr. 1452.
 and *cas. ibid.*
Vide Rex v.
Mayor of Col-
chester.
 2 T. Rep. 259.

But in such case, where the officer is in possession, the election must appear to be clearly colourable, and the mayor, or officer *de facto*, must be made a party to the rule.

2. "The power given by this statute is limited to no
 " time."

*Case of Corpo-
 ration of Oxford.*
 Bull. N. P. 201.

For the Court have granted a mandamus to proceed to the election of a mayor, where there has been no legal mayor for four preceding years.

*Case of Corpo-
 ration of Scar-
 borough.*
 2 Stra. 1180.

3. The statute is not confined to the election of the head officer of the corporation only, but the Court will order, under the statute, the corporation to proceed to the election of the inferior and constituent officers of the corporation.

*Rex v. Edyvean
 & Spiller.*
 3 T. Rep. 352.

4. Under the statute, public notice in writing of the election is to be fixed in some public place in the borough; and where a mandamus was granted to elect a mayor for the borough of *Bodmin*, and a rule made that public notice should be affixed in the market-place, which was done; the Court granted an attachment against the defendants for not attending, (their presence being necessary to the election,) though
 they

they had only been served with a copy of the rule, but not with the mandamus, or with the original rule.

These are the principal cases in which a mandamus will be granted; but as its object is to provide for every defect of justice, and the relief it gives of general extent, how far the Court will go in granting this writ, will better appear by considering,

2. FOR WHAT THE COURT WILL NOT GRANT A MANDAMUS.

1. "The Court will not grant a mandamus to a person to do any act whatever, where it is doubtful whether he has by law a right to do such act or not; for such would be to render the process of the Court nugatory; as if the person had no right, he might so return it."

As where the application was to the Court for a mandamus to be directed to the Bishop of Ely, commanding him to hear an appeal as visitor of Trinity College, Cambridge, made on an affidavit that the bishop declined hearing the appeal till he was satisfied that he was visitor; on shewing cause it appeared not clear to the Court that the bishop was visitor, and in fact that he had never exercised that right, the Court therefore refused the mandamus; for the Court will not grant a mandamus to compel any person to exercise a jurisdiction which that person is not most certainly and clearly appointed to, and bound by law to exercise.

Rex v. Bishop
of Ely.
1 Will. 266.

So where the application was for a mandamus to the churchwardens of St. Botolph's, Bishopsgate, commanding them to call a vestry in Easter week, to elect new churchwardens; it was refused, as there was no instance of such a mandamus; and the Court could not take notice who had a right to call a vestry, and consequently did not know to whom it should be directed.

Anon.
1 Str. 686.

2. "The Court will not grant a mandamus where the office claimed is not of a certain permanent nature, nor where it cannot give a complete remedy."

As where the motion was for a mandamus to the bishop of London, to license the Rev. Mr. Dawney, to preach as lecturer of St. Ann, Westminster; but it appearing that the lectureship was not endowed, but depended on the voluntary subscriptions of the inhabitants, the Court held the office to be of such a nature that it would not interpose.

Rex v. Bishop
of London.
1 Will. 11.

[666]

And in this case which was for a mandamus to the bishop, to license a lecturer to St. Luke, Chelsea, the same objection as in the last case was taken and allowed; and beside, that unless there was an endowment or immemorial custom to ap-

Rex v. Bishop
of London.
1 T. Rep. 331.
Rex v. Field &
alt.
4 T. Rep. 125.
S. P.

point a lecturer without the consent of the rector, that it would be nugatory to grant a mandamus to the bishop, as the rector might refuse the use of his pulpit to the person licensed or maintain trespass against him in case he used it, the freehold being in the rector; so that the mandamus could not give the party complaining complete redress.

“ But it is not necessary, in order to induce the Court to interfere by mandamus, that the office is of a *freehold nature*; it is sufficient that it is an *annual office*, and has fees *annexed*.”

Rex v. Commissioners of the Land Tax of St. George in the Fields.
1 T. Rep. 146.

This was the doctrine held by the Court in this case, which was an application to the Court for a mandamus to the defendants, *to proceed to the election of a clerk*, and which was opposed, on the ground that the office was not of such a nature as would induce the Court to interfere; but the mandamus was granted, the clerk being *entitled to certain poundage fees under the statute, which are granted to him by an annual warrant from the commissioners*.

“ But where the office is of a *mere private nature*, the Court will not grant a mandamus.”

Stamp's case.
1 Sid. 40.
Vid. S. P.
1 Vent. 143.
Mod. Caf. 18.

Upon which ground the Court refused a mandamus to restore a person to the place of *steward of a court baron*; but it will be granted to restore a person to the office of *steward of a court leet*, because that concerns the administration of justice.

“ But in all cases of public concern, or of offices of a *public nature*, the Court will grant a mandamus.”

Anon.
1 Str. 696.
Rex v. March, Governor of the Turkey Company.
2 Burr. 1000.

As to swear in a director of the *Amicable Assurance Company*, which is a company created by charter from the crown; so to compel an admission into a trading company.

3. “ The Court will not grant a mandamus *where there is any other specific legal remedy* by which the person complaining may obtain redress.”

Rex v. Governor and Company of the Bank of England.
Doug. 506.

Therefore in application for a mandamus to the Bank, to compel them to transfer stock, the Court refused it, because *the party had a remedy by action on the case*, if they refused.

Rex v. Street & alt.
Mod. Caf. 98.
* [667]

* So where the application was for a mandamus to be directed to the old churchwardens to hand over *the parish books to the new ones*, the Court refused it; for *they might have a right to keep them*, and that right might be tried by an issue at law.

Rex v. Mayor of Colchester.
2 T. Rep. 259.

So where the application was for a mandamus to be directed to the mayor of *Colchester to admit Mr. Grimwood to the office*

office of recorder, on the ground that the mayor admitted several illegal votes for Mr. *Smithies* who had been admitted and sworn in, and had rejected several legal ones of Mr. *Grimwood's*, the Court refused it, on the ground that *the remedy was by quo warranto* to set aside the election of *Smithies*, he being in possession of the office.

Vid. S. P. Rex v. Bishop of Chester. 1 T. Rep. 396. Vid. Rex v. Guardian to the Poor in Canterbury. 1 Black. 667.

So the Court refused a mandamus to the benchers of an inn of court, commanding them to call a person to the bar; for the proper remedy in such a case *is by appeal to the twelve judges*.

Rex v. Benchers of Gray's Inn. Doug. 339.

So the Court refused a mandamus to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; because there was a remedy by indictment in case he refused to obey such order.

Rex v. W. Britton. 6 T. Rep. 168.

4. "Wherever a controlling power, or *power of appeal*, *is exclusively lodged in any person or corporation*, the Court will not grant a mandamus: this is the case of *visitors of colleges*, or others of spiritual foundation."

For the acts of a visitor cannot be questioned in any court of law.

Rex v. Bishop of Chester. 1 Will. 206.

"But this is the case only where the visitor is acting within his visitatorial power."

For where the Bishop of *Ely* was visitor of *Peterhouse College*, and by the statutes of that college the fellows are to return two to the visitor, who is to appoint one to be master of the college on a vacancy; and the fellows having returned two, *the bishop appointed neither*, but nominated another person to be master; it was held by the Court, that his power was restrained and limited in this particular under the statutes, and that therefore the Court could compel him to act within his authority, and accordingly made the rule absolute for a mandamus to him, *to admit one of the two so returned to him by the fellows*.

Rex v. Bishop of Ely. 2 T. Rep. 290.

So where the Bishop of *Chester* was visitor of *Manchester College*, and he accepted the place of warden, it was held, that his visitatorial power was suspended, and that a mandamus might go to him in his other capacity as warden.

Rex v. Bishop of Chester. 2 Stra. 798.

"So the Court will compel a visitor to act as such, though they will not interfere with his decision."

As where a mandamus was prayed to the Bishop of *Lincoln* as visitor of *Lincoln College, Oxford*, to receive, hear, and determine an appeal of Dr. *Halifax*, who complained of an undue election to the rectorship of that college; the Court held, that where the statutes have appointed a visitor, who is to interpret the statutes of a college, and an appeal is lodged with him, the Court will compel him to hear the parties,

Rex v. Bishop of Lincoln. Trin. 25 Geo. 3. Cit. 2 T. Rep. 358.

* [668]

parties, and come to some decision, though they will not oblige him to go into the merits; for it is sufficient if he decides that the appeal comes too late.

6. "Where any other court has competent jurisdiction, the Court will not interfere by mandamus to control it."

Rex v. Dr. Hay.
4 Burr. 2295.

Smyth's case.
Str. 892.

Vid. Rex v. Dr.
Hay. 1 Black.
640.

3 Lev. 309.
3 Mod. 332.
Show. 217. 251.

Skin. 290.
Carth. 160.

John Giles's
case.
2 Stra. 881.

Rex v. Pro-
prietors of the
Birmingham
Canal Naviga-
tion. 2 Black.
Rep. 708.

Cafe of Ando-
ver. 2 Salk. 433.

[669]

Therefore where the validity of a will is contesting in the spiritual court, and a suit then depending there concerning it, the Court will not grant a mandamus to the judge of such court to grant a probate to any particular person: so the Court will not grant a mandamus to the judge of the ecclesiastical court to grant administration *durante minore etate*, for the law has not decided who is entitled to such administration; but in the case of a common administration, the next of kin being entitled to it by law, a mandamus may go to that effect.

So it will not lie to admit a proctor into the spiritual court, for that court has jurisdiction over its own officers.

7. "The Court will not grant a mandamus to a person, commanding him to do any thing which he is not under a legal necessity of doing; that is, if the law has left a discretion in him, the Court will not control it."

As where the application was for a mandamus to be directed to the justices of peace, to compel them to grant a licence to *Giles* to keep an ale-house, it was refused; for it is discretionary in the justices to grant or to refuse it.

So where under a stat. 8 Geo. 3. for an inland navigation to *Birmingham*, commissioners were empowered to make a cut or canal from a place called *Newhall Ring*, near *Birmingham*, and from such other places near the town as might be found convenient; the commissioners had begun a cut in another direction, and this application was to compel them to make a cut to *Newhall Ring*; but it was refused, for the act only gives an authority to the commissioners to proceed, not a command: they may desert or suspend the whole work, and *à fortiori* any part of it.

8. "If several have been deprived of any corporate offices or rights, each must have a separate mandamus, for one writ cannot go to restore many; for the foundation of the writ is the turning out; and the turning out of one is not the turning out of another, and they may be removed for different causes; and so the wrongs being distinct, so should be their remedies."

3. OF THE PROCEEDINGS IN GRANTING A MANDAMUS.

1. "The Court will often grant a mandamus in the first instance, on motion, under particular circumstances."

As

As where the motion was for a mandamus to the defendants to sign a poor's rate, which it was proved was regularly made, but the defendants refused to allow it. *Per* C. J. Ryder, If we grant a rule to shew cause, while it is depending, the poor may starve, as no overseer will disburse any money until the allowance of the rate for collecting it; therefore let it be absolute in the first instance.

Rex v. Fisher
& alt. Justices
of Berks.
Sayer's Rep.
160.

2. "But the usual mode is by rule to shew cause; as to which it has been settled,"

That in the application to the Court, the nature of the office respecting which the application is made, must be shewn to the Court; for as there are certain cases in which the Court will not interfere by mandamus (*ante* fol. 665.) the office to be affected by the mandamus applied for, might be of that description.

Therefore, where it was to swear in one who was elected one of the eight men of Ashbourn Court, it was denied, as it did not appear what the nature of the office was. 2 Mod. 316.

3. "Where a person applies for a mandamus, he must shew some title or colour of title in him, to induce the Court to interfere."

Therefore, where the application was for a mandamus to the trustees of a dissenting meeting-house, to restore one Lloyd to the office of minister of the congregation; in his affidavit he only stated his appointment, and that he conceived that he could not be removed without his consent, unless he should misbehave, but that his appointment was for life. This was opposed, on the ground that a former minister had been removed, that Lloyd had no licence, was not regularly ordained, and had not complied with the regulations of the act of toleration. The Court were of opinion, that he had not made out any, even a *prima facie* title to this office, which was necessary; and refused the mandamus.

Rex v. Jotham.
3 T. Rep. 575.

* So where the motion was for a mandamus to the warden of the Vintner's company, to swear J. S. one of the court of assistants; the affidavit was only that he had been informed by some of the court of assistants that he had been elected, but no positive affidavit of an election; the Court nevertheless granted a rule, there being an affidavit that he had applied to inspect the court books to see if he had been elected, and was refused, without which affidavit the Court would not have granted the rule; but said, that had there been a positive affidavit of his election, they would have granted that writ in the first instance.

Rex v. Vintners
company, Mich.
25 Geo. 2.
Bull. N. P. 200.
*[670]

"But though, where a party so applies for a mandamus, whereby he is to be restored to a corporate right, he must shew some title in himself; yet the Court of

"K. B. having the supreme superintendance of all corporations, will grant a mandamus *where no particular person is interested.*"

Cafe of the town
of Nottingham.
23 G. 2.
Bull. N. P. 201.

As where by charter or prescription the corporate body is to consist of a definite number, and they neglect to fill up the vacancies as they happen, the Court will grant a mandamus ordering them to do it.

4. "It should be shewn to the Court on the application for a mandamus, *that there had been a default*; for the Court will not presume that any officer or other person has not done his duty, unless that is shewn to the Court."

Rex v. Bor. of
St. Ives.
Mich. 5 Geo. 3.
Bull. N. P. 199.

Therefore, where the mandamus was granted to the churchwardens and overseers of the poor, *to make a rate for the relief of the poor*, the Court would not grant at the same time a mandamus *to the justices to allow it*; for there could be no default in the justices till the poor rate was made, and presented to them to allow it; and the Court would not presume that the justices would not do their duty: though in this case the same justices had refused to allow a rate when a mandamus had issued for the purpose, and had been taken up the term before, on an attachment for disobedience.

Rex v. Vintners
comp. Mic.
25 Geo. 2.
Bull. N. P. 200.

5. "Where the corporation is by prescription, the party applying for a mandamus must shew the constitution of the corporation, and verify it by affidavit as well as his own right: where the corporation is by charter, a copy of it must be produced at the time of making the motion."

[671]

6. "If on the party's shewing cause before the Court, it appears that there was good grounds for his removal from that office, to which he applies to be restored, they will not grant a mandamus, even though there appears to have been some irregularity in the proceeding by which he was removed."

Rex v. Mayor
of London.
2 T. Rep. 177.

For where the application was for a mandamus to restore one *Roberts* to the place of clerk of the *Bridge-House* estates of the city of *London*, it appeared that he had been reported a defaulter in his accounts to a considerable amount, by the city auditors; and that being called to account, and to produce his vouchers, he wrote a letter to the committee, refusing to comply with their requisition; upon which he was suspended, though *he had not been regularly summoned to make his defence*, which should have been done; yet the facts above appearing clearly, the Court refused a mandamus.

Rex v. Mayor,
&c. of Ax-
bridge.
Comp. 523.

So where a mandamus was applied for to restore a person to the office of town-clerk, the corporation laid before the Court

Court a very full and sufficient cause for removing him, and that he himself had openly declared in court that he would serve them no longer. The prosecutors' counsel admitted, that there was sufficient cause for a motion, but objected, that he had been removed *without notice* to appear and defend himself. *Per Lord Mansfield*, The Court will not grant a party the assistance of a prerogative writ, when it is acknowledged that the corporation had sufficient cause to remove him, and when they would undoubtedly again remove him the instant he was restored.

But where a rule is granted, if on shewing cause it appears doubtful whether the party has a right or not, yet the Court will grant a mandamus, in order that the right may be tried on the return. Rex v. D. Bland.
Bull. N.P. 200.
Trin. 1741.

7. Though the Court have granted a mandamus for any purpose, yet may they grant another, and concurrent mandamus for the same purpose; but such concurrent mandamus is *not of course*, but is only granted where there is reasonable ground to suspect that the party who first moved for the mandamus does not really mean to execute it, and then a rule is granted to shew cause. Rex v. Wigan,
& Rex v.
Burghey.
2 Barr. 782.

And where there are such applications for concurrent mandamuses, the Court will order a time for proceeding to an election to be inserted in the first mandamus. Rex v. Hale-
mere. Sayer
Rep. 106.

And where there has been a judgment of ouster against a corporate officer, the Court will not grant a mandamus to proceed to the election of another, until the four-day rule given on the *poslea* is out, because *till then judgment cannot be actually signed*; and on such application for a mandamus to proceed to a new election, the prosecutor on the former judgment shall have priority. Rex v. West
Looc.
3 Burr. 1386.
[672]

8. "The rule to shew cause must always be on the same persons to whom the writ is to be directed, in case the rule should be made absolute."

Therefore, where the rule was on the churchwardens and overseers to shew cause why a mandamus should not go directed to them, and *the twenty principal inhabitants*; it was held to be bad; for these last should have been parties to the rule. But the Court gave leave to amend, saying, it would be good on new service. Rex v. Church-
wardens and
Overseers of
Clerkenwell.
8 Geo. 1. Bull.
N.P. 200.

And if the mandamus is to proceed to the election of a corporate officer, of which a person is then in possession, *he must be made a party to the rule*. Rex v. Bankes.
3 Burr. 1453.

4. OF THE WRIT.

Under this head is to be considered, 1. The direction of the writ : 2. The body or mandatory part of the writ : 3. The return.

1. TO WHOM THE WRIT IS TO BE DIRECTED.

1. "A mandamus must regularly be directed to those persons by whose authority the party was deprived of that right, to which he applies to be restored, and who therefore have a power of restoring him."

Rex v. Mayor,
&c. of Derby.
Salk. 436.

Therefore, where the mandamus was to the *mayor, aldermen, and capital burgeses of Derby*, commanding them to command A. and B. who had removed the party complaining, to restore him, the writ was quashed; for it was absurd that the writ should be directed to *one person to command another to do any act*: it should have been directed to the parties themselves who were to do it.

2. "The writ should be directed to the corporation by its corporate name, where the power of motion resides in the corporation at large."

Rex v. Mayor,
&c. of Rippon.
2 Salk. 433.

[673]

Therefore where the mandamus was directed to the *mayor, aldermen, and commonalty of Rippon*, and they returned that they were incorporated by the name of the *mayor, burgeses, and commonalty of Rippon*; the Court held the writ to be bad, it being directed to the corporation by a wrong name.

"And though the thing to be performed is to be done by only part of the corporation, yet may the writ be directed to the corporation at large, though it may also be directed to that part of the corporation who are to do the act required by the mandamus."

Rex v. Mayor
of Abingdon.
2 Salk. 699.

But it must be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation, which part are not to do the thing required, the writ shall be quashed.

Rex v. Mayor
of Hereford.
2 Salk. 701.

Therefore where a mandamus to admit a person to the office of town-clerk, was directed to the *mayor and aldermen of Hereford*; in fact, the mayor only was to admit; for this fault the writ was quashed; for it would not be known who were to obey the writ, if the direction was insignificant or immaterial.

Rex v. Mayor,
&c. of Norwich.
1 Stra. 55.

So where the mandamus was directed to the *mayor, aldermen, and common-council of Norwich*, to proceed to the election of a town-clerk, the Court granted a superseadeas of the

the writ, it appearing to the Court on affidavit, that the right of election was in the mayor and aldermen, and the writ was not directed to *them*, neither was it directed to the corporation by their corporate name.

“ But if the writ includes in its direction the whole corporation, or that part which is to make the return, it shall be good, though there may be some informality in the direction.”

As where it appeared that the power of amotion was in the mayor, aldermen, and others of the common-council, the mayor and aldermen being part of the common-council, and the writ was directed to the mayor, aldermen, and common-council, as if excluding them from being part of it, and it was moved to quash the writ for misdirection: But *per Cur.* Here is no one in this direction who must not join in this act; it is only repeating the several constituent parts of the corporation; and mentioning the entire common council after the mayor and aldermen, is only a repetition *quoad* the mayor and aldermen; and therefore the motion was refused.

Pees v. Mayor of Leeds.
1 Stra. 640.

3. “ Where a writ of mandamus is directed to several acting in different capacities, the writ shall be taken *reddendo singula singulis*; that is, that each person shall do that which belongs to his office.”

As where the writ was to the mayor and burgesses of Tregony, commanding them, viz. “ *quod eligitis & juratis majorem, &c. secundum auctoritatem vestram*,” &c. It was moved to supersede this writ on the ground that the power of electing was in the burgesses, and that of swearing in the mayor alone; so that the mayor could not make a return of this writ as directed to him to elect, nor the burgesses as directed to them to swear: But the Court held, that the writ was to be taken distributively, and that each was to obey the writ according to their several functions.

Rex v. Mayor, &c. of Tregony.
Mod. Caf. 111.

[674]

4. The Court will not specify to whom the mandamus shall be directed, for this might be prejudging the right of the electors; but he who applies must at his peril have it properly directed.

Rex v. Wigan.
2 Burr. 784.

The writ need not set out that the person to whom it is directed is the person whose duty it is to do that for which the mandamus is granted (as to swear and admit, *ex. gr.*); for if it is misdirected it should be so returned.

Rex v. Ward.
2 Stra. 893.
3 Ref.

2. OF THE BODY, OR MANDATORY PART OF THE WRIT.

1. “ The writ must be made out according to the rule upon which it was applied for and granted.”

Therefore

Rex v. Wild-
man, 2 Stra.
379

Therefore where the mandamus was granted, commanding the defendant to deliver *to the company of blacksmiths* all books, papers, &c. which he had in his custody as clerk to the company, from which he had been removed, and the officer took the rule, *to deliver them to a new clerk*; for this variance the writ was superseded, and the party compelled to apply for a new writ.

1 L. Ray. 560.
Bull. N. P. 504.

2. " The writ should contain convenient certainty of the duty required to be done, but need not set forth by what authority that duty exists."

Rex v. Mayor
and Burgeffes of
Nottingham.
Sayer's Rep. 36.
Bull. N. P. 204.
S. C.

As where a mandamus had been granted, wherein it was recited that there ought to be in the town of *Nottingham* a common-council, consisting of twenty-four persons, and commanding the defendant to choose six persons to fill up the vacancies; upon motion to quash the writ it was objected that *the nature of the right to have such a common-council, that is, whether by charter or prescription, or how, was not set forth with sufficient particularity*: but the objection was over-ruled, many precedents being to the contrary, and no precise form being necessary in a mandamus.

Moore v. Mayor
of Hastings.
Caf. temp. Hard.
362.

*[675]

Rex v. Dr. Bet-
tesworth.
2 Stra. 857.

So where the suggestion of the writ was, that the party had a right to be admitted to the office of —, paying a * reasonable fine, that is sufficient without shewing how, or by whom it is to be assessed.

So where the mandamus was to the defendant, as judge of the prerogative court of *Canterbury*, to grant probate of the will of Lord *Londonderry*, and exception was taken to the writ, that it only set out that the Earl had *bona notabilia* at *Westminster* and divers dioceses; but did not say within the province of *Canterbury*, in which case only the defendant could grant the probate: but the Court refused it, saying, that they would not presume an inferior jurisdiction.

3. " It seems that a mandamus can only command the doing of one single act, or be but for one single purpose."

Rex v. Church-
wards of
Weobly.
2 Str. 1259.

For in this case the Court granted a mandamus to the defendant to make a poor's rate, but *refused to order particular persons to be inserted in it*, though there was an affidavit that such persons were rateable, and that they were omitted to prevent their voting for members of parliament; for the validity of the rate might be tried by appeal.

Rex v. Mayor
of Kingston
upon Hull.
1 Stra. 578.

So the Court granted a mandamus to the mayor to hold a corporate assembly, but refused to add to it, " To admit all persons having a right;" for this involved other questions, and was too complicated, as each person's right was distinct.

" But

" But in such case the writ may command several persons
 " acting in their distinct capacities to act officially according
 " to their respective offices."

As where by custom, the court-leet was to present to the steward the person whom the commonalty had chosen to be mayor; the Court granted a mandamus to the steward to hold a leet, and to the burgesses to attend at such court, and to present *J. D.* who had been chosen by the commonalty.

Rex v. Borough of Christchurch. 12 G. 2. Bull. N. P. 200.
Rex v. Midhurst. 1 Will. 283. S. P.
Called Rex v. Ld. Montague. Bull. N. P. 200.

5. If the corporation to which the mandamus is sent is above forty miles from *London*, there shall be fifteen days between the teste and return of the first writ: but if but forty miles or under, then but eight days, and the writ should not be tested before it was granted by the Court.

Anon. Salk. 434.

And in such case one day is to be taken exclusive, and the other inclusive.

Rex v. Mayor of Dover. 1 Stra. 107.

3. OF THE RETURN.

Writs of mandamus being either to restore or admit, I shall consider distinctly the return to each.

Returns are to be considered, 1. In point of substance:
 2. In point of form.

[676]

1. Of the Return in point of Substance.

In order to make a return good in this respect, it must appear, 1. That the removal was by persons who had legal power to remove: 2. That the person was removed for good and legal cause: 3. that the proceedings under which the removal took place were regular.

Of each of these in order.

1. The Amotion must have been made by Persons having lawful Authority to do so.

It seems to have been long a question in whom the power of amotion resided. Lord *Coke* in this case lays it down, that this power can only belong to the corporation by charter or prescription. But this doctrine has since been exploded; and it has been solemnly adjudged that there is *incident to every corporation, a power of amotion.*

Bagg's case, 11 Co. 99.
Lord Bruce's case, 2 Stra. 819.
Rex v. Richardson. 1 Burr. 539.

The law therefore now is, that corporations may claim a power of amotion either by charter or prescription; charter may give it to the whole, or to a select body, but if it gives it to neither, the law gives a power of amotion to the whole body at large.

Rex v. Mayor of Lyme Regis. Dougl. 144.

But

Rex v. Corp. of
Doncaster.
Tr. 25 Geo. 2.
Sayer 37.

But a power of amotion can never be exercised by a *part* of the corporation, as the common-council, *ex. gr. unless expressly given by charter or prescription.*

2. The Person must be removed for good and legal Cause.

Good causes of amotion may be in general for malfeasance, or for nonfeasance; that is, for crimes, which render him unfit for the duties of his station; or neglect, such as prevents him from the due discharge of them.

Bagg's case, 11
Co. 99. & per
Lord Mansfield.
1 Burr. 339.

1. Malfeasances or crimes are of three descriptions: First, Such as are infamous in their own nature, but have no relation to his office; as attainder for forgery, perjury, or conspiracy at the King's suit, or for any crime rendering him infamous: but to *ground a removal for any of these causes, there must be a previous conviction by indictment in the King's courts*: 2. Such crimes as are offences against his oath of office, and duty as a corporation; such as burning or erasing the records of the corporation: for this crime he may be tried and convicted by the corporation, and for that removed: 3. Crimes of a mixed nature, such as are both indictable and against his duty as a corporator; as bribery.

[677]

Mod. Caf. 19.
100.

Under this general description of offences it is to be observed,

1. "That the offence sufficient to justify the removal of a corporator, or corporate officer, must appear to have been done *malo animo*."

Rex v. Willis.
4 Burr. 1999.

For where the recorder of a borough gave wrong advice with regard to corporate proceedings, as it appeared to have been innocently done, it was adjudged to be an insufficient cause of removal.

2. "As to such crimes whereof a previous conviction is necessary to found the disfranchisement on, it is the infamy of them that renders him an improper person to be continued in an office of trust; therefore, if the crime for which he is convicted be such as carries no infamy with it, it will be no cause of disfranchisement."

It was therefore held,

Rex v. Mayor,
&c. of Liverpool.
2 Burr. 723.

That a *corporator having become a bankrupt*, was in this case adjudged to be an insufficient cause of removal; for bankruptcy is neither a crime in the eye of the law, nor an offence in any light contrary to the duty of a corporator; for which causes only the removal would be lawful.

Rex v. Mayor
of Derby.
2 Geo. 2. Bull
N. P. 206.
Carrth. 173.

So a conviction *for an assault* is an insufficient cause; for such is not an offence of an infamous nature.

3. "The

3. "The offence, if not on account of the infamy, must have some respect to the corporation itself; that is, such as is detrimental to the corporation itself, or some of its liberties, privileges, or franchises."

Therefore a personal offence from one member to another is not a sufficient ground of disfranchisement: so though rasure of the corporation-books may be a good ground; yet, unless it be in a matter to the detriment of the corporation, it is otherwise: so misemploying the corporation-money is not a sufficient cause of removal, because the corporation may have their action.

Bull. N. P. 203.

Ibid.

2 Raym. 1283.

"So a mere contempt of, or contemptuous words used to the corporation, or any member of it, is not a sufficient ground of amotion."

As where in a mandamus to restore Dr. Bentley, the return of the cause of his amotion was, that being cited to answer a plea of debt in the Vice-Chancellor's court, he said the process was illegal and unstatutable, and that he would not obey it; that he took the process from the officer, and said the Vice-Chancellor was not his judge, and that he *fulste egit*; for which contempts that he was at a future congregation deprived: the Court were of opinion that these causes were insufficient; though a peremptory mandamus to restore him was granted on another ground, *viz.* that he had not been summoned.

Rex v. Chancellor, &c. of Cambridge.

2 Stra. 557.

*[678]

4. "A misbehaviour in one office is no ground to amove a person from another."

As where the person had misbehaved in the office of chamberlain, and he was removed from being a burges, it was held not sufficient.

2 Raym. 1564.

5. "Where an office is held at pleasure, in such case the person in possession may be removed without any cause assigned."

1 Lev. 291.

1 Vent. 77. 32.

As where the mandamus was to the churchwardens of Thame, to restore J. Williams to the office of sexton; they returned, that Thame was an ancient parish, and that for time immemorial there has been a church; that the sexton was eligible by the churchwardens and major part of the inhabitants; which person so elected was to continue at the pleasure of the electors, and was amovable by the major part when lawfully assembled; that 1 May 1703, J. Williams was elected sexton, and continued in the office till 31st of June 1717; on which day the churchwardens and parishioners being lawfully assembled, he was removed; the return was adjudged to be good, though no other cause was assigned for his removal than the pleasure of the electors.

Rex v. Churchwardens of Thame.

1 Stra. 115.

Rex v. Mayor of Canterbury.

1 Stra. 674.

" But where an officer is so removable at will, and is
 " removed by the corporation, if they in *their return* to a
 " mandamus to restore him do not rely on their power, but
 " *return a cause of removal, if that is insufficient*, the Court
 " will grant a mandamus to restore the person removed."

Rex v. Mayor
 of Oxford.
 2 Salk. 428.

As where the mandamus was to restore one *Slatford* to the office of town-clerk, and the return stated him to be an officer at the will of the mayor and aldermen; but that he was removed, his office being void for *not having taken the oaths of allegiance, &c. before them*; this being insufficient, as he might have taken them before two justices, a mandamus went to restore him, though it had been sufficient if they had stated that he had been removed, as holding his office at pleasure.

[679]

2. Nonfeasance, or neglect of the corporators duty, is the next legal ground of amotion.

As to this it has been decided,

Rex v. Mayor
 of Leicester.
 4 Burr. 2087.

1. " That to make this a good cause of amoval, it must
 " amount to *an absolute desertion and neglect of all the duties of*
 " *a corporator*; for an occasional absence for a short time,
 " as for health or urgent business, that shall not be suffi-
 " cient."

Rex v. Wells.
 4 Burr. 1999.
 Serj. Whitaker's
 case.
 Salk. 434.

As where the recorder of a borough was absent from *one session*, where his presence was necessary, and where he had no notice to attend; without shewing any further intention of leaving the borough: it was held an insufficient cause to remove him; though non-attendance is otherwise a good ground to remove a recorder, his office being a public one relating to justice.

Rex v. Richard-
 son.
 1 Burr. 317.
 Rex v. Mayor
 and Aldermen
 of Carlisle.
 1 Stra. 385, 386.
 S. P.

So absence from four occasional great courts, and one on a stated day, was adjudged to be not a sufficient ground for amotion; for a corporator may be innocently absent where he may not think his presence absolutely necessary; and therefore unless he neglects where he has a particular summons and notice, it cannot be construed a desertion of his office.

Rex v. Ponson-
 by M. 25 Geo. 2.
 Bull. N. P. 206.
 4 Mod. 56.
 Vid. Vaughan
 v. Lewes.
 Carth. 227.

2. Non-residence is another species of non-feasance: but it is only in the case of offices which require a perpetual execution; as mayor, sheriff, coroner, where perpetual residence is necessary; but in other cases local residence is not necessary; as in the case of recorder, freemen, &c. for it would be absurd to say that non-residence merely should be a cause of amoval, where, notwithstanding such non-residence, they may do all their duties requires; though if such persons totally neglect their office and duty, they may be removed.

Therefore

Therefore where the corporator resided three miles from the borough, it was held, that that was not such a desertion of his office as to justify a removal; for he was near enough to attend his corporate duty.

Rex v. Mayor
of Doncaster.
Sayer Rep. 37.

So that in such case it is not sufficient to shew a non-residence; for unless there be an express clause in the charter, non-residence will not be of itself a cause of amoval, but it would be good in any case to shew such a non-residence as amounts to a total desertion or dereliction of their office.

Rex v. Miles.
P. 9 G. 1.
Bull. N. P. 207.

Therefore where a corporator resided 200 miles from the borough, and had been absent for 22 years, this was considered as a total desertion of the duties of his offices, and holden to be a good cause of amoval.

Rex v. Mayor
of Newcastle.
Cited Sayer 39.

* And where a corporator is removed on the ground of non-residence, it is not necessary for the corporation to give him notice to come and reside before they remove him; for he is bound by his office to reside; and if such is the law, he ought to know it.

Rex v. Mayor,
&c. Lyme Regis.
Doug. 144.
3 Ref.
*[680]

3. The Proceedings under which the Removal has taken place, must be regular.

1. "Where a corporator is to be removed, every individual member of the corporation, or part of the corporation, in whom the power of amotion resides, ought to be summoned."

Rex v. Mayor,
&c. of Liverpool.
2 Burr. 723.

Therefore where all the members of the corporation had been summoned, *except one*, whom the bailiff had supposed to have been absent and out of summons, though he had a house and resided within the town, the Court resolved, that for this irregularity the amoval was clearly bad, as a summons should have gone to every member.

Kynaston v.
Mayor, &c. of
Shrewsbury.
2 Stra. 1051.

"When it is said, that every member must be summoned, it means every member within summons; that is, resident within the limits of the borough."

Bull. N. P. 208.
5 Burr. 2601.

For if it appears that he lived out of the limits of the borough, it is not necessary to return that he was summoned.

Rex v. Mayor,
&c. of Newcastle.
2 G. 2. L. Ray.
226.

Quere, If such summons is necessary where the meeting is on a charter-day?

2 Burr. 742

2. "This notice should contain the particular business; that is, that the amotion of a corporator was the business for which they were summoned."

Rex v. Mayor
of Doncaster.
1 Burr. 738.

“ For though convened *on other business*, they cannot proceed to disfranchise a corporation, unless they have met in pursuance of a notice for the purpose of removing him, even though he himself is present.”

Rex v. Corp.
of Carlisle.
Trin. 6 G. 1.
1 Stra. 384.
L. Raym. 1357.
S. P.

For where on a return to a mandamus, it appeared that the power of amoving was in the mayor and aldermen as a select common council: that the whole corporation having been summoned to *elect a recorder*, after the election was over, the mayor and aldermen separated from the rest, and removed the prosecutor. This was adjudged to be void, for want of summons to the common-council only, to meet for the purpose in their distinct capacity.

2 Burr. 731.
* [681]

* 3. “ So particular notice must be given to *the party himself* who is to be disfranchised, that the assembly mean to proceed to remove him, in order that he may prepare his defence.”

Rex v. Chancellor,
Master, and
Scholars of the
University of
Cambridge.
1 Stra. 557.

As where a mandamus was granted to restore Dr. Bentley; the defendant returned, that he had been summoned to answer in a plea of debt before the Vice-Chancellor's court, and that he had refused obedience, and acted contumaciously, for which the congregation removed him; but it appeared, that Dr. Bentley had never been summoned to answer before the congregation; for that omission the Court granted a peremptory mandamus to restore him.

Rex v. Mayor,
and Burgesses of
Axbidge.
Cowp. 532.

But where a corporate officer had declared that he would serve no longer, and had in other respects misdemeaned himself, though he was removed without notice, the Court refused the writ to restore him, the causes of removal appearing so sufficient.

Rex v. Mayor,
&c. of Rippon.
2 Salk. 433.

So in the case of a mandamus to restore Sir J. Jennings to the office of alderman, the corporation returned, that at an assembly of the corporation, he came and *personaliter libere & debito modo resignavit* his office, declaring he would serve no longer; wherefore they chose another in his room: this was held to be good, though the Court further held, that till such election he had power to waive his resignation.

Rex v. Mayor
and Burgesses of
Wilton.
Salk. 428.

So where the mandamus was to restore Elias Chalk to the place of burgesses of Wilton, the defendants returned a custom to remove for misbehaviour, and then set out several instances of misbehaviour; and that *he being therefore fully heard to all that was objected in the common-council*, he was turned out; it was objected, that it was not said that he was summoned; *sed per Cur.* The end of the summons is, that he may be heard for himself, and therefore where he has been heard, want of summons is no objection.

Note.

Note. Where the mandamus is to admit, the question turns on the validity of the election; which will be fully considered in the chapter of *Quo Warranto*.

2. Of the Return considered in Point of Form.

- 1st. Who shall make the return: 2d. In what manner:
3d. The proceedings on the return.

1. Who shall make the Return.

A mandamus was directed to the mayor, bailiffs, and burgeses of the town of *Abingdon*; the mayor made a *return, and brought it into the crown-office, intending to move to have it filed; and a motion was made to stay the filing of it on a suggestion, that this return was made by the mayor and the minor part of the corporation against the consent of the majority, who would have obeyed the writ: but *per Holt*, Where a writ is directed to a single officer, as a sheriff, and a stranger makes a return without his privity, he may at any time that term wherein the writ is returned, come in and disavow it; but not after the term: (*Dyer*, 182.) But in this case, where the writ is directed to several, and the mayor, who is the most principal and proper person, returns and brings in the writ, the Court will not upon affidavits examine whether there was the consent of the majority: the return must be received, and a remedy lies against the mayor; and if the return is falsified, a peremptory mandamus must go.

Rex v. Mayor,
&c. of Abingdon.
Salk. 431.
Rex v. Mayor,
&c. of Norwich.
Salk. 432. S. P.
* [682]

In what Manner the Return is to be made.

1. "The return to a mandamus should set out all necessary facts precisely, to shew the person removed in a legal and proper manner, and for a legal cause: it is not sufficient to set out *conclusions* only; the *facts* must be precisely set out, that the Court may judge of the matter. So it is the same as to the *cause* of the motion, that must likewise be set out."

Per Ld. Mansfield. 2 Burr. 731.

Therefore where to a mandamus to restore one *Joseph Clegg* to the place of common-councilman of *Liverpool*; the defendants returned generally the cause of the motion, by the common-council, who were *in due manner met and assembled*: the Court held the return to be bad; for that they were so duly assembled was a conclusion of law; they should have set out the facts, viz. That *they had as a select body the power of motion*: that *the members were summoned by regular and proper notice*: and that *Clegg himself was also regularly summoned and heard in his defence*.

Rex v. Mayor,
Bailiffs, and
Burgesses of
Liverpool.
2 Burr. 723.

Rex v. Mayor
and Aldermen
of Doncaster.
Sayer Rep. 37.
1 Ref. Dougl.
144. S. P.

So if the amotion has been by a *part of the corporation*, the return should shew *how they have such authority, whether by charter or prescription*; for as the power of amotion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it; that is, whether by charter or prescription.

2 Ld. Raym.
1564.

2. "Therefore a return in *too general terms* is bad: as "to say that the party had obstinately refused to obey the "rules and orders of the corporation, contrary to the duty "of his office, without saying what these rules and orders "were."

Rex v. Mayor
and Aldermen
of Doncaster.
Sayer Rep. 37.
3 Ref.

* [683]

Rex v. Balivos
de Morpeth.
1 Stra. 58.

* So a general return of removal for *neglect of duty* has been held to be bad, without stating *the particular instances of neglect and omission*, that the Court may judge of its sufficiency.

So where the mandamus was to restore *A.* to the place of schoolmaster of the grammar-school of *Morpeth*, and the defendants returned, that at the time of publishing the act *primo* of his Majesty's reign, *A.* was under-schoolmaster, *that he never took the oaths by the act appointed, ratione cujus* he became incapable, and that therefore they could not restore him: This return was held to be bad, as being in too general terms; it should have said that he did not take the oaths of supremacy, allegiance, and abjuration, and such as are required by a schoolmaster; for he is not obliged to take the *Scotch* oath: so there is an exception of officers in the fleet, &c. It therefore should appear that he was not excepted: *for the party having no opportunity to plead in this case, the return ought to be certain to every intent.*

Show. 365.

Braithwaite's
case.
1 Vent. 19.

3. The return must answer to the material part of the writ, not to the words only; for if it be false in substance, though true in words, an action will lie.

4. "The return to a mandamus may contain *any number* "of *concurrent and consistent causes*, to shew why the party "should not be admitted or restored."

Wright v. Faw-
cett.
4 Burr. 2041.

As where the mandamus was to admit the plaintiff to the place of *freeman* of *Morpeth*; the return was, 1st, That he *was not duly elected*: 2d. That by the custom of the borough, no person could be admitted as a freeman, unless he was approved of by the lord of the manor or borough, and that the plaintiff *was not so approved*; objection was taken to this return, *that it was double*: but it was nevertheless held good, and that the officer might return any number of good and consistent causes.

"But the causes must be consistent."

Therefore

Therefore where the mandamus was to restore a person to the office of sexton; the return was, 1st, That he was not duly elected: 2d, That there was a custom in the inhabitants to remove at pleasure, and that they had so removed him pursuant to the custom: It was objected to this, that the causes were inconsistent; that he was not duly elected, and yet that he was regularly turned out: But the Court held the causes to be consistent: for as he was in possession *de facto*, they might justify the removal either on the ground that he was not duly elected, or, if he was so, that they had a right to remove him at their pleasure.

Rex v. Church-
wardens of
Taunton, St.
James.
Cowp. 413.

* But where the mandamus was to admit one *Dunch* to the place of alderman of *Norwich*; the defendants returned, that when a person is elected alderman by the ward, the court of alderman may refuse him: That *Dunch* was so chosen aldermen by the ward, but they refused to admit him, because he had not received the sacrament within the year; that he was turbulent and factious, and procured his election by bribery; and *quod non fuit electus*. The Court agreed that several causes might be returned, but that they must be consistent, which here they were not; for when *Dunch* was chosen by the ward it was an election, before approbation by the aldermen; the return first admits this election and avoids it, and yet at last they return that there was no election, which is repugnant.

Regina v. Mayor
and Aldermen
of Norwich.
2 Salk. 436.

* [684]

But if a return to a mandamus consists of several independent matters not inconsistent with each other, but some good in law and some bad, the Court may quash the return as to such as are bad, and put the prosecutor to plead to or traverse the rest.

Rex v. Mayor,
&c. of Cam-
bridge.
2 T. Rep. 456.

5. If the mandamus is to restore the person applying to an office *held at pleasure*, and the defendants who have that power of removal *do not return* it, but return that the removal is for a misdemeanor or such cause, and the Court find that cause so returned insufficient in law, they will not refer the removal to the power the defendants may have to remove *ad libitum*; but take it that the removal was for the cause returned, and grant a peremptory mandamus.

Rex v. Mayor,
&c. of Oxford.
Salk. 428.

And where the corporation have such power to remove at their pleasure they must return it *positively*, and not by way of recital.

Rex v. Mayor,
&c. of Coven-
try.
Salk. 430.

6. " If the supposal of the writ is wrong, as in mis-stating the constitution of the corporation, the return must deny this supposal of the writ, and it will not be sufficient to state it truly in the return."

Therefore where a mandamus issued to the defendants, reciting, That whereas *they ought to chuse yearly two bailiffs out of such as had not been bailiffs for three years before, ideo they*

Rex v. Bailiffs
and Burgesse of
Malden.
Salk. 431.

[685]

were commanded to chuse; they returned their constitution by letters patent to be *to chuse two from among the aldermen*, and that they had chosen two according to the form and effect of the letters patent generally; this was held bad; *for they ought to deny their constitution to be as mentioned in the writ*, or shew a compliance with the writ; whereas they *have acted according to a constitution set forth in the return different from the writ, and yet have not denied the supposal of the writ*; so a peremptory mandamus was granted.

Rex v. Bailiffs,
&c. of Ipswich.
2 Salk. 434.

So if the writ is directed to the corporation by a *wrong name*, they should return the matter specially and rely on it; but if they make a return, they admit themselves to be the corporation to whom the writ was directed, and cannot afterwards avail themselves of the misnomer.

Rex v. Lyme
Regis.
Doug. 130.

7. Clerical mistakes in the returns to writs of mandamus may be amended after the filing of the return.

Mayor of Co-
ventry's case.
Salk 428.

8. Where the mandamus is by writ out of chancery, no attachment lies for not returning it till the pluries issues; but where the mandamus is out of the King's Bench, the first writ ought to be returned; but an attachment is never granted without a peremptory rule to return the writ.

Anon.
2 Salk. 434.

And if the corporation to which the mandamus is sent be above forty miles from *London*, there must be fifteen days between the teste and return; but if it is forty miles or under, eight days only.

2 Ld. Raym.
148.
1 Ld. Raym.
223.

9. The return need not be under the seal of the corporation, nor signed by the mayor; but if an action is brought against the mayor for a false return, proof of the delivery of the writ to him and of the return made, will be sufficient.

3. Of the Proceedings on the Return.

These proceedings are either at common law, or under the statute 9 of *Ann.*

1. Of the proceedings at common law.

Bagg's case.
11 Co.
Carth. 171.

1 Ld. Raym.
504.

1. This was by *action on the case for a false return*; and where the return is made by several, the action may be either joint or several, for it is founded on a tort; but it must not be against any of those who voted against the return, but who were over-ruled by the majority; for the action lies against the individuals, though the return is made in the name of the corporation.

Rex v. Bailiffs
of Bridgworth.
2 Stra. 808.
1 Ld. Raym.
125.

And where the mandamus was directed to the two bailiffs, one was for obeying the writ, the other would not, nor join in the return; the Court granted an attachment against both, saying,

saying, It would be endless to try in all cases which was right; and it would always be used as an handle to delay.

But if they made no return, an attachment would issue.

* 2. Where several have joined in an application for a mandamus, they should all join in an action for a false return. 2 Stra. 305.
* [686]

And where in case for a false return, the plaintiff set out his election as on the 1st of *October*; proof that he was chosen the 29th of *September* was held to support the declaration, for the day was but form. Carth. 228.
Sir Peter Rich
v. Pilkinton,
Lord Mayor of
London.
6 Mod. 152.

3. Where an action was brought for a false return, and the plaintiff had a verdict, so that the return was falsified, the Court always granted a peremptory mandamus; but the plaintiff could not move for a peremptory mandamus till the four days after the return of the *postea*, because the defendant had till then to move for arrest of judgment. S. 2.
Buckley v. Palmer.
2 Salk. 430.

But where the action had been brought in the Common Pleas, and the plaintiff had a verdict, and then moved in *K B.* for a peremptory mandamus, the Court refused it; for *per Holt*, the mandamus recites *prout patet recordum*, which cannot be here, as we cannot take notice of the records of the Common Pleas. Anon.
Salk. 428.

5. OF THE PROCEEDINGS UNDER THE STATUTE 9 ANN.

By this stat. 9 *Ann. c. 20.* it is enacted, " That where
" any person has been deprived of his freedom, or of any
" corporate office to which he was entitled, or refused admission thereto, where a mandamus had so issued, and
" a return made thereto, it should be lawful for the persons so suing the mandamus to plead to or traverse all or
" any of the material facts contained in the return, to which
" the persons making the return may plead, take issue, or
" demur, and the proceedings be had as in an action on the
" case, and the issue be tried in the same manner; and if a
" verdict shall be found for the persons suing out the mandamus, or they have judgment on demurrer, or *nil dicit*,
" or in any manner; that in such case the party so succeeding shall have damages, costs, and a peremptory mandamus: but if the persons making the return have judgment,
" they shall in like manner have their costs."

Under this statute it has been held,

1. That as the first writ of mandamus always concludes with commanding obedience or cause to be shewn to the contrary; if a return is made to it, which on the face of it appears to be insufficient, the Court will grant a peremptory Rex v. Church-
wardens and
Overseers of
Salop.
Hil. 8 Geo. 2.
Bull. N. P. 207.

WRITS OF MANDAMUS.

remptory mandamus; and if that be not obeyed, a peremptory mandamus shall issue against the persons disobeying it.

Bull. N. P. 201.

And where the mandamus is directed to the corporation to do a corporate act, and no return is made, the attachment is only granted against particular *persons* who refuse obedience to it; but where it is directed to several persons in their natural capacities, there an attachment shall go against all: but when they are before the court their punishment will be proportioned to the offence of each.

Rex v. Mayor,
&c. of Nottingham.
Hil. 25 Geo. 2.
Bull. N. P. 203.

And where no particular person is interested in the false return, the Court may nevertheless grant *an information* against the persons who made it; but the return must be filed and allowed before the information can be moved for.

Kynaston v.
Mayor, &c. of
Shrewsbury.
2 Stra. 1053.

2. Where the return to a mandamus is traversed and tried, but at the trial the jury omit to find damages, whereby there can be no judgment for costs, this cannot be supplied by a writ of inquiry; but the plaintiff may have an action for a false return.

CHAPTER II.

Of Informations in the Nature of
Quo Warranto.

INFORMATIONS in the nature of *Quo Warranto* are granted by the court of *King's Bench*, for the purpose of trying the rights of persons to any corporate or other franchise into which they have intruded, for the purpose of removing them.

In treating of this proceeding, I shall first consider what intrusion into corporate or other franchises shall be deemed a proper subject for an information in the nature of *quo warranto*: 2dly, The proceedings to obtain it, and the rules laid down by the Court in granting it.

I. WHAT INTRUSIONS INTO CORPORATE OFFICES ARE
OBJECTS OF INFORMATIONS QUO WARRANTO.

1. Intrusions into corporations are, 1st, Where the person was ineligible: 2dly, Where the election of the person has been irregular, informal, or contrary to law: 3dly, When made under a bye-law: 4thly, Where the election has been held before a person without authority: 5thly, Where the office becomes void by any subsequent matter.

1st. Of Elections void for Ineligibility of the
Person.

1. As where the defendant had been elected a burghess of *Portsmouth* at five years old, though he was not sworn into the office till he was the age of twenty-one, yet was he deprived by information *quo warranto*, the Court being clearly of opinion, that an infant was ineligible to such a corporate franchise. Rex v. Carter.
Cowp. 220.

2. By stat. 13 Car. 2. it is enacted, "That no person shall be chosen to any corporate office who has not taken the sacrament within a twelvemonth preceding the election; and in default of so doing, the election shall be void."

Per Ld. Ch. J. This statute is not only addressed to the elected, and a
 Wilmot, Harri- prohibition upon them, but is a prohibition to the electors,
 son v. Evans. if they have notice: The legislature has commanded them
 cit. Cowp. 535. not to chuse a non-conformist, because he ought not to be
 Rex v. Monday. trusted. Both by the statute therefore and authorities, the
 Cowp. 535. election is void: And the statute 5 Geo. 1. ch. 6. § 3. ap-
 and recognized plies only to persons in actual possession, and was made to
 per Ld. Mans- quiet such possession, if no legal remedy was pursued within
 field S. C. a certain time.
 Cowp. 517.

2. Of Elections void for Irregularity.

1. "Where the mode of election is directed by the
 "charter, that must be followed, or the election shall be
 "void."

It will therefore be necessary to consider the several con-
 structions on different charters which have come before the
 court.

Rex v. Grimes. 1. In this case by the charter, the election of the mayor
 5 Burr. 2598. was ordered to be made by the mayor and the burgesses, or
 Rex v. Bell- the majority of them: it was adjudged on this, That in order
 ringer. to a good election there must be a *majority in number of the*
 4 T. Rep. 810. *corporation actually assembled*, by whom the election must be
 S. P. made; and therefore where the corporation consisted of the
 mayor and eleven burgesses, and *four only* met and elected
 the mayor, that this election was void, such not being a
 majority of the subsisting burgesses.

Rex v. Rees, & And so if the major part of the corporation was dead, it
 Rex v. New- has been held that the corporation would have been dissolved,
 sham. or at least that those who survived could not have proceeded
 Pasch. 1775. to a new election. But where the words give the election
 cited per Aston to a majority of the members for the time being, it will be
 Just. Cowp. 537. different.

Rex v. Smart. 2. "Where the charter of the borough of *Malden* or-
 4 Burr. 2241. dered the election of an alderman to be *by the bailiffs and*
 "head burgesses, or the major part of them;" there were two
 bailiffs; both were present when the defendant was elected,
 but one of them was afterwards ousted on an information
quo warranto; it was resolved, That by the words of the
 charter, the bailiffs were an integral part of the corporation
 without whom no valid act could be done, and that the pre-
 sence of *both* was necessary; that by the judgment of ouster
 against one of them, the directions of the statute were not
 complied with, for the election was then before *one* only;
 and so there was judgment for the King.

Sir Robert Salif- * 3. The borough of *Denbigh* consists of two bailiffs, two
 bury Cotton aldermen, and twenty-five capital burgesses, and the election
 v. Davies. of the capital burgesses is ordered to be by the bailiffs, alder-
 1 Stra. 53. men, and capital burgesses for the time being, or a majority
 * [690] of

of them, of which one bailiff and one alderman must be two; it was adjudged, That the statute only required the presence of one bailiff and one alderman, but gave them no negative voices, so that a person might be elected, though they both voted against him.

4. In the borough of *Truro* the mayor is to be chosen out of the aldermen *annuatim eligend.* the fact at the trial was, that the aldermen present at the defendant's election had been in several years, and none of them had been re-elected within a year; it was held that *annuatim eligend.* was only directory, and that an annual election of them was not necessary to make an election in their presence good: and Ch. Just. King, who delivered the opinion of the Court, compared it to the case of constables and other annual officers, who are good officers after the year is out until others are elected and sworn.

Foot v. Prowse,
Mayor of Truro.
1 Stra. 625.

6. How far the granting of a new charter shall affect the corporate proceedings, is proper here to be taken notice of.

When an integral part of a corporation is gone, and the corporation has no power to restore it, or to do any corporate act, the corporation is dissolved, and the Crown may grant a new charter; as in this case of the borough of *Helston*, of which corporation only one alderman and seven burgeses remained; and no mayor could be elected, or any alderman chosen, nor could the burgeses either by usage, prescription, or charter hold any corporate assembly; the Court were of opinion, That the corporation was dissolved, and the new letters patent, granting them a new charter, to be valid.

Rex v. Pafmore.
3 T. Rep. 199.

If a corporation refuse a new charter, it is void; but if they accept and put it in execution, it is good; and whether a corporation have accepted a new charter or not, is matter of evidence, not of law; and proof of acting under it is proof of acceptance.

Comb. 316.

By accepting a new charter, granting new rights, or giving a new name of incorporation, without a surrender of their old charter, the corporation will not lose any of their former franchises.

Vent. 355.
4 Co. 87.

* By the charter of *Hen. 4. Norwich* was made a county, and to have two sheriffs to be chosen by the commonalty. *Char. II.* by charter confirmed their former charter, but granted further, that one sheriff should be chosen by the mayor, sheriffs, and aldermen only. *Per Holt Ch. Just.* The King cannot resume an interest he has already granted, unless the grantees concur: the corporation might have used this as a new grant or confirmation; and having made the election

Rex v. Larwood.
Salk. 167.

* [691]

election in question according to it, it is evidence of their intention to accept it as a grant.

Rex v. Phillips.
1 Stra. 394.

In a *quo warranto* against the defendant, as mayor of Bodmyn, he claimed under a charter 5 Eliz. whereby a power was given to him to hold over the office of mayor till another was chosen; but it appearing that by a subsequent charter 36 Eliz. the mode of election was altered, and all former modes of election abolished, though the words were, abolishing the modes *eligendi, nominandi, & appunctuandi* the mayor; this was held to abolish the right of holding over, though it said nothing of abolishing the mode *tenendi* the office.

Newling v.
Francis.
3 Term Rep.
189.

The proclamation made by James II. in the fourth year of his reign, for restoring such corporations to their ancient charters as had surrendered them to Charles II. (but which surrenders were not inrolled), shall operate as a grant of revival of such charters (if accepted), and restore them.

I shall now proceed to other informalities, by which elections may be avoided.

2. "Where the election has been by the body corporate, *but not corporately assembled by previous summons*, such election is void, unless the whole elective body be present, and consented."

Sir Charles
Muggrave v.
Nevinson.
2 Ld. Raym.
1358. 1 Stra.
S. C. 584.

As where the whole common council, (who were the electors,) *except one*, met at a public-house to drink, when they were acquainted that *W.* had resigned, upon which it was proposed to choose the plaintiff, which was objected to by two or three; however, he was sworn in: This was holden not to be a good election, on the grounds above.

2 Ld. Raym.
1355.

So where upon evidence it appeared that the corporation met upon a particular day (pursuant to a bye-law) *for the election of a mayor*, it was holden that they could not proceed to the election of an alderman *for want of summons*, there being no custom to warrant it.

Rex v. Grimes.
5 Burr. 2598.

[692]

So all the members individually should be summoned to attend the election; but if any of them are not within summons, as not resident within the borough, such person need not be summoned.

Per Lord Mansfield.
5 Burr. 2682.

3. "So where there is any *usual mode of giving notice* of an election, that mode cannot be dispensed with, nor can the election be good without complying with it, unless all the persons who have a right are actually summoned and unanimously agree."

Rex v. May.
Rex v. Little.
Freemen of
Saltaish.
5 Burr. 5681.

As where the *usual place* of corporate elections was the Guildhall, and the *usual notice* was by ringing a bell at eight, nine, and ten o'clock on the morning of the election; the election

election of the defendants was not at the *Guildhall*, but at an inn; was upon a bye day, and there was no notice by ringing of the bell; but all the electors entitled to notice had personal notice of this meeting at the inn, and of the business to be there transacted; the Court concurred in the doctrine above delivered by Lord Mansfield.

4. "Where a number are to be elected, they should be put up singly, and the sense of the electors taken upon each."

For where the mayor and four aldermen met to elect seven burgesses, the mayor and one alderman gave in a list of seven, and the three aldermen a list of seven also; but of these last some were ineligible; and the election was declared to fall on the seven given in by the mayor, one of whom was the defendant: this election was adjudged to be void, first, Because the several persons had not been put up singly; 2dly, It being contended, that as part of the aldermen's list had been incapacitated, the three votes given to them must be deemed as absolutely thrown away; and that as it was not in the power even of the majority present to prevent the election, that part of the mayor's list must be held to be elected, and that the election must be deemed to fall on the defendant: but it was resolved, that the mayor's list being entire, it was impossible to say that any individual of them was elected; and so the election was void as to all.

Rex v. Monday.
Cowp. 530.

"It is said in the last case, that when a corporate assembly is convened, it is not in the power of any part of the members to stop the election; on which point the following decision took place:"

As where the question was, whether the defendant or one Seagrave was duly elected to the place of town-clerk of Nottingham: the case was, that all the electors, in number twenty-five, were regularly summoned, and twenty-one met; the mayor put up Seagrave, and no other person was put in nomination; nine of the twenty-one voted for Seagrave, but twelve did not vote at all, and eleven of them protested against any election being then held, the office being at that time, as they alleged, full of Foxcroft, whose right was then contesting in K. B., and there was a written protest to that effect, which was signed by ten of them, the eleventh declaring that he suspended doing any thing; the mayor declared Seagrave duly elected, and swore him in accordingly: the Court were of opinion, that after the corporation was duly summoned, the election must be proceeded on, and that the only way to prevent the election from falling on any particular person was by voting for another; that this had not been done here; and that the mere protest was of no avail, and so confirmed the election of Seagrave.

Oldknow v.
Wainwright.
Rex v. Foxcroft.
2 Burr. 1017.

[693]

5. "Where

5. "Where the election has been in pursuance of stat. 11 Geo. 2. the directions of the statute must be pursued, or the person is removeable by *quo warranto*."

Rex v. Charles
Malden.
4 Burr. 2130.

For where no election had been had of the bailiffs of *Malden* on the charter-day, and on the day following, by virtue of the stat. 11 Geo. 2. divers of the then aldermen and head-burgesses, in whom the right of election was, met for the purpose of the election; at which meeting the defendant *Malden* (he being an alderman) *did preside*; he was elected, and at the meeting *took the oaths of office before* Jonas Malden, William Smart, and John Edwich, *being three other senior aldermen of the borough*, and was therefore admitted bailiff of the same: this election was adjudged to be void, on the ground that "by the words of the statute, the person elected is to take the oaths *before the officer who shall preside at the election*," which not having here been complied with, the election was void.

Withnell v.
Gartham.
Esplin. Caf. N.P.
322.

6. "Where the right of election to any office is given by an old deed to any number of persons, usage as to its construction and meaning is admissible evidence; and traditional evidence is admissible in proof of usage."

Rex v. Miller.
6 T. Rep. 268.

Tamen quere, & vid. Rex v. Miller, 6 Term Rep. 268. where the Court were doubtful how far usage might be pleaded to assist the Court in the construction of a doubtful charter.

7. "Where the officer or corporator elected is to be sworn in before any officer of the corporation, there must be his assent to the swearing; it is not sufficient that it was done *in his presence*."

Rex v. Ellis.
2 Stra. 994.

For where by the charter of *New Romney*, the mayor is to be sworn in before his predecessor; at the election there were two candidates, *Ellis* and *Whitchurch*: *Ellis* had the majority, notwithstanding which the mayor ordered *Whitchurch* to be sworn; upon which the town-clerk read the oath; and both *Ellis* and *Whitchurch* put their hands on the book and kissed it; it was ruled, that this was not a good swearing by *Ellis*, it being without the assent of the mayor.

Cafe of the
Mayor of Pen-
ryn. 1 Stra. 582.

And though an officer *has been legally elected*, yet if the *swearing in has not been regular*, he shall be removed by *quo warranto*; for the swearing in is as necessary to a complete investment of his office as the election.

[694] 3. Of Elections void for Illegality of the Bye-Law under which the Election has been held.

If the defendant in an information *quo warranto* justifies under a bye-law, the validity of that bye-law decides the validity

validity of the election; it will be therefore to be inquired, What bye-laws are good?

1. "Where the corporation is by charter, they cannot make bye-laws to restrain the number of those by whom the election is to be made by charter."

As where by the charter of *Maidstone*, the corporation was directed to consist of a mayor, thirteen jurats, and forty common-council, who should have a power of making bye-laws; and it is directed by the charter, that the election of the common-council should be by the mayor, jurats, and *commonalty*; a bye-law limiting the election to be by the mayor, jurats, and *sixty of the senior common freemen*, was adjudged to be a bad bye-law; for there was no power to make a bye-law depriving a part of those entitled to vote under the charter in the election of the common-council from exercising that right. Rex v. Cutbush.
4 Burr. 2204.

So where the power of making bye-laws was in the mayor and aldermen under the charter, which also settled the power of electing the burgesses to be in the mayor, aldermen, and *commonalty*; a bye-law restraining the election of the burgesses *to the mayor and aldermen only* is bad, though declared to be made *with the assent of the commonalty*; for the bye-law could not take away the right of election which was in the body at large under the charter, and the assent of the commonalty is of no avail, as they had under the charter nothing to do with the making of bye-laws for the borough. Rex v. Head &
alt. freemen of
Helfton.
4 Burr. 2515.

2. "And on the same principle, a bye-law cannot narrow the number of persons *out of whom* an election is to be made; as for example, by requiring a qualification not required by the charter."

As where the election of the common-council was in the mayor, jurats, and *commonalty*: a bye-law limiting it to the mayor, jurats, and *to such of the common freemen who should have served for one year the offices of churchwarden or overseer of the poor*, was held to be bad, as not warranted by the charter. Rex v. Spencer.
3 Burr. 1827.

* 3. "But where the power of making bye-laws is in the body *at large*, they may delegate their rights to a select body, who so become the representative of the whole community." Per Lord Mansfield.
3 Burr. 1841.
* [695]

And where by charter or prescription *the mode of electing officers is not regulated*, a power resides in the corporation to make bye-laws for their own regulation with respect to the elections. Newling v.
Francis.
3 T. Rep. 187.

" And

“ And where a good bye-law is so made and adopted, the
 “ election must be made in pursuance of it, or the election
 “ will be bad.”

Barber v.
 Boulton.
 1 Str. 314.

As where by the charter of *Macclesfield*, the mayor is to be chosen out of the capital burgeses, by the capital burgeses, who are twenty-four in number; it was found that the usage had been for above fifty years preceding, for the common burgeses to put in nomination five of the capital burgeses, out of which the capital burgeses chose the mayor, and that this usage was by virtue of a bye law, not now extant in writing: in this case the common burgeses put eight in nomination, out of which the mayor was elected; the Court agreed that the bye-law and usage was good, but that the election was void, for it had neither pursued the bye-law nor the directions of the charter.

4. “ Bye-laws made under the foregoing restrictions,
 “ and whose object is to avoid confusion, and to pro-
 “ vide for the better government of the corporation, are
 “ good.”

Green v. Mayor
 of Durham.
 1 Burr. 128.

For where on a mandamus to admit the plaintiff to the place of freeman of the fraternity of free-masons of *Durham*, the defendant returned, That by a bye-law made by the corporation it had been ordered, that every person to be admitted to the freedom of the city should be called at three several meetings of the mayor, aldermen, and wardens of the several companies, which meetings were held on stated days, and be there approved of; and that the plaintiff was not so called and approved of, and therefore could not be admitted; this bye-law was adjudged to be good.

Rex v. Cor-
 poration of
 Barber-Sur-
 geons.
 2 Burr. 392.

So where a bye-law was made by the corporation of surgeons, That no one should be admitted to the freedom of their corporation unless he understood Latin, it was adjudged to be good.

[696]

4. Of Elections void, as being made before Improper Officers.

Rex v. Smart.
 4 Burr. 2241.
 ante.

1. By the charter the election was to be held before the two bailiffs; both in fact presided at the election; but judgment of ouster was afterwards had against one of them; this, it was held, destroyed the election.

Rex v. Nat.
 Dawes.
 4 Burr. 2277.

2. But if an information *quo warranto* is brought against a corporator, with a view of disfranchising those whose title depends upon his, he shall not be allowed by collusion with the prosecutor to let judgment go against him by default, for if the other corporators, whose right depends on his, apply to be admitted to defend, the Court will permit them on indemnifying him.

3. In an information *quo warranto*, impeaching a title on the ground of judgment of ouster against the returning officer; the judgment is admissible, but not conclusive evidence against the corporator.

Rex v. Grimes.
5 Burr. 2598.
5 Ref.

It is now held to be conclusive, if the party under whom the corporator derives title has judgment of ouster against him.

Rex v. Mayor of York.
1 T. Rep. 66.

5. Of Elections void, by Matter subsequent.

1. "If a person is in possession of a corporate office, and is elected to another, the duties of which are incompatible with those of the former, the appointment to the latter office is equivalent to an amotion; and if the party continues to exercise it, he may be removed by an information *quo warranto*."

Rex v. Goodwin.
Doug. 383.
22.

For where an information was moved for against the defendant, to shew cause why he claimed to be an *alderman of Bedford*, he having been elected to the office of *town-clerk*; it appeared that the *town-clerk's accounts* are allowed by the *aldermen*, and that he was a *ministerial officer* attending on the corporate courts and meetings, under the controul and direction of the *aldermen*; the Court held, that this made the offices incompatible, and granted the information.

Rex v. Pateman.
3 T. Rep. 777.

So where the defendant was a jurat of *Hassings*, and he was elected to the place of *town-clerk*, and it appeared that the office of the jurat was judicial, and that of the *town-clerk* ministerial in the same court, they were adjudged to be incompatible.

Milwood v. Thatcher.
2 T. Rep. 80.

But in this case it was decided, That the defendant who was steward of *West Looe* (an higher office as was alleged) being elected a *capital burghess*, did not avoid either office; for they were compatible.

Rex v. Trelawney.
3 Burr. 5615.

2. "Where the admission of corporators is by the stamp-acts ordered to be on stamps, there must be an admission for each regularly stamped."

[697]

For where the defendant's admission appeared to be, together with five others, written on one stamped admission, but five other blank stamped sheets of admission were annexed to it, the admission was adjudged to be void.

Rex v. Reeks.
2 Stra. 716.

2. OF THE PROCEEDINGS BEFORE THE COURT OF K. B. IN GRANTING INFORMATIONS QUO WARRANTO.

Under this head I shall consider, 1st, The mode of application to the Court: 2dly, The rules laid down by the Court

Court granting informations of this nature: 3dly, The proceedings on the part of the defendant, and on the part of the crown: 4thly, Of the costs.

1. Of the Mode of Application to the Court of King's Bench.

Rex v. Collingwood & al.
3 Burr. 573.

" 1. It is enacted by stat. 9 Ann. c. 20. " That where any
" person shall usurp any corporate franchise or office, it
" shall be lawful for the proper officer, with leave of the
" Court, to exhibit an information *quo warranto* against
" him, at the relation of any person desiring it who shall be
" named therein, and on this the Court shall proceed; and
" if the rights of many may be determined, the Court may
" give leave to consolidate them."

2. " And if the persons against whom the informations
" have been filed are found guilty of such usurpation, the
" Court shall give judgment of ouster against them, and fine
" them, and also give costs to the relator: but if the de-
" fendant has judgment, he shall have costs."

Rex v. Carmarthen.
2 Burr. 869.

But no information *quo warranto* can be granted against any corporation, as a body, for any usurpation on the Crown, except in the name of the Attorney-General.

Hawk. P. C.
162.

The practice therefore under this statute, is to move for a rule to shew cause why an information in the nature of *quo warranto* should not be granted, &c. grounded on an affidavit, stating the usurpation; which rule must be served on the party, and on the return of it, the Court exercise their discretion.

Rex v. Brown.
East. 29 G. 3.
quot. 3 T. Rep.
574.

* And the requisitions of the statute are so positive, that the Court cannot dispense with them, though the application is by a stranger to the corporation.

*[698]

2. Of the Rules laid down by the Court of K. B. in granting Informations Quo Warranto.

1. " The Court will not grant an information *quo war-*
" *ranto* against a person exercising a corporate franchise,
" to which he has been legally elected, though he has com-
" mitted an offence which might amount to a forfeiture,
" until he has been removed by the corporation."

Rex v. Heaven.
2 T. Rep. 777.

For where the defendant was an alderman of Bedford, but had thirteen years before removed from the borough, and not resided in it afterwards, and it was sworn to be the usage of the borough, that every alderman removing from it, and not residing therein, forfeited his office; the Court refused

refused the application for an information *quo warranto* against him, *the corporation not having removed him.*

2. "It is made a *quare* in this case, whether in any case a derivative title can be impeached where the person from whom it is derived died in possession of his office undisturbed: But it is decided, That such title shall not be impeached by those who have acquiesced, and acted under it: And Justice *Blackstone* was of opinion, that a derivative title could not be so impeached, in any case where the party was dead under whom the defendant claimed." Rex v. Stacey.
1 T. Rep. 1.

For where the defendant derived his title under the Duke of Bolton, as mayor of *Winchester*, it was contended that the duke was not legally mayor, he not being an inhabitant at the time he was chosen, and so was not eligible; the duke was dead, and Justice *Blackstone* would not suffer them to go into evidence, whether he had been legally chosen or not; but whether he had been *de facto* mayor; which it appeared he had by the corporation-books. Rex v. Spearing.
Lent Ass. Win-
chester, 1771.
Quot. 1 T. Rep.
4.

3. Where the party relator stands in the same circumstances with the defendant against whom he applies for a *quo warranto*, or where granting the information may disfranchise so many as may endanger the dissolution of the corporation, the Court will exercise their discretion, and refuse the information. Rex v. Bond.
2 T. Rep. 767.

4. In a rule for an information against the defendant, the objection to his election was, that his election was on the same day he was proposed, whereas it should be on the following, under a bye law made in 1766; in answer to this it was shewn, *that the relator was party to an agreement by the corporation not to enforce this bye-law*, and that if any one's title was impeached, who had been elected under it, that it should be defended at the public expence; the Court rejected the application on those grounds. Rex v. Mort-
lock.
3 T. Rep. 300.
[699]

5. The titles of persons who are *de facto* members of a corporation, admitted, sworn, &c. in the actual enjoyment of their offices, cannot be impeached upon the trial of a *person elected by them.* Per Lord Mans-
field.
Cowp. 507.

"But where there is no other mode by which the title of the electors can be questioned in the first instance, the rule does not apply; and the Court will grant an information against the elected."

As was this case, which was rule for an information *quo warranto* to shew cause by what title the defendant claimed to be portreeve of the borough of *Fowey*, and setting out the right of election to be in the *Prince's* tenants duly admitted, and stating that twenty-two out of fifty persons sworn of the homage, who had presented the defendant for portreeve, had been improperly admitted; though this was impeaching their titles Rex v. Mein.
3 T. Rep. 595.

through that of the defendant, the Court granted the information.

Rex v. Stacey.
1 T. Rep. 1.
Rex v. Sym-
mons.
4 T. Rep. 223.

6. The Court will not grant an information *quo warranto* on the application of a person who was present at and concurred in the defendant's election; but if many join in the application, and one of them has not concurred in the election, if he will avow himself the relator, the Court will grant the information.

Rex v. Smith.
3 T. Rep. 573.

But this is not the case where the disability avoiding the election is a *latent one*; for where the application was on the ground that the defendant *had not taken the sacrament within a year before his election*, as required by stat. 13 Car. 2. stat. 2. c. 1. and it was opposed, on the ground that the persons applying had concurred in the defendant's election; the Court held, that that objection held only where the relator *concurred in the election, knowing of the defect*; but that this was latent, an omission of an act required to be done by every person elected to an office, and not known at the time of the election.

Rex v. Harvey.
1 Stra. 547.

7. On an information *quo warranto* against the defendants, to shew by what authority they acted as burgesses, having never been admitted; *the only action alleged was voting at the election for members of parliament*: the Court would not grant the rule, saying, that as they claimed a right to vote, that was only properly inquirable before the House of Commons.

[700]

Case of the Bo-
rough of Horf-
ham.
Hil. 30 G. 3.
quot. 3 T. Rep.
599.

But in this case it is said, that it had been often ruled, that an information *quo warranto* would lie against a person claiming to have a right to vote by virtue of a burghage tenure.

Rex v. Wil-
liams.
1 Stra. 677.

8. On an application for an information *quo warranto* against the defendant, for not having taken the oaths of supremacy and allegiance, and made on the application of the town-clerk, who swore he had not administered them, though he made an entry stating that he had; the Court refused the application, as it would be a dangerous consequence to allow a town-clerk to disqualify members on his own oath, contrary to the record.

Rex v. Newling.
3 T. Rep. 310.

So where the application was, stating that the relator *believed* that the defendant was not duly sworn, and the affidavits on the other side *did not swear that he had been duly sworn in*, but only stated *that he appeared from the books to have been duly sworn in*; the Court refused the application.

Winchelsea's
cases in Burr.
Rep. passim.
Rex v. Dickin.
4 T. Rep. 282.

9. It was formerly settled as a rule by the Court of King's Bench, never to allow an information *quo warranto* to go against a person who had been twenty years in possession of his corporate franchise; but the Court had established it as a rule, that no information *quo warranto* should go where the party

party had been six years in possession; and that is now confirmed by statute.

It is enacted by stat. 33 Geo. 3. c. 58. "1. That to any information *quo warranto*, the defendant may plead that he has held the office or franchise for six years preceding the information, and such shall be a complete bar. 2. A title derived under any election shall not be impeached by reason of any defect of title of the person or persons electing, if such person or persons were in possession *de facto* of his or their franchise or office six years before the filing of the information. 3. The officer having the custody of the corporation-books, must permit the inspection of them at all times."

10. As to the affidavits upon which the Court are to decide, it has been decided,

That if the relator's affidavit is defective in stating a material fact, but that fact is afterwards stated in the defendant's affidavit; the Court may use the latter affidavit in support of the prosecutor's application, as where the relator's affidavit omitted to state the mode of election, but which was done by the defendant.

Rex v. Mein.
3 T. Rep. 496.

3. Of the Proceedings on the Part of the Defendant, [701] and on the Part of the Crown.

1. On the return of the rule, the defendant may shew cause why the information should not go against him; and these are good causes:—That the right has been already determined by mandamus; that it has been acquiesced in for many years; that the defendant's right depends upon those who voted for him, which are then undetermined; that the franchise is of a private nature; or he may disclaim that he ever acted under his election, for there must be a user as well as claim, in order to subject the party to an information *quo warranto*; for the judgment is, that he be fined *pro usu & usurpatione*.

Hawk. P. C.
162.

Rex v. Whitwell.
5 T. Rep. 85.
Rex v. Ponsonby.
M. 25 G. 2.
Bull. N. P. 211.

2. In civil actions the plaintiff can only recover by the strength of his own title, but the defendant in *quo warranto* informations is bound to shew a good title in himself against the crown, or judgment will go against him; therefore where the defendant claimed, by two titles, prescription and charter, but relied on the first, which was found against him, though it was contended for him, that he might have a good title under the second, yet the Court gave judgment of ouster against him; for the Crown may take issue on any matter that may shew the defendant to have usurped the franchise; and if one material issue be found for the Crown, it shall have judgment.

Rex v. Leigh.
4 Burr. 2143.

Rex v. Latham
& alt.
3 Burr. 1485.

"And where the defendant relies on the title in a particular form, he must prove it as laid."

Rex v. Mein.
4 T. Rep. 481.

For where the defendant made title to his admission of freeman of *Fowey*, on the presentation of *twenty-three* homagers, free tenants of the borough and manor, and on issue taken on that, it was found that *but two of them were of that description*, the issue was held to be found for the Crown, the plea being falsified.

Rex v. Blagden.
Gilb. Rep. 145.

3. The defendant's plea should set out his title at length, and conclude with a general traverse of *absq. hoc. quod prad. &c. usurpavit*, &c. and the crown should not take issue upon the general traverse, but reply to the special matter; for so the defendant knows how to apply his defence.

4. Of the Costs.

[702]

" The statute 9 *Ann. (ante)* is confined to cases of usurpations of corporate offices or franchises, and therefore
" where the information is at common law, there can only
" be judgment of ouster; but the Court cannot give costs."

Rex v. Williams.
1 Burr. 402.

Therefore where the information against the defendant was "*for holding a court within the borough of Denbigh*, which
" should only be held by the bailiffs, of which he was not
" one," and there was judgment against him; the Court held, that the relator could not have his costs, for this was not an usurpation within the statute of *Ann.*

PART THE THIRD.

Of Evidence.

IN treating of the Law of Evidence, I shall first consider the nature of evidence in general: Secondly, The rules adopted by the Court in receiving it.

1. OF THE NATURE OF EVIDENCE IN GENERAL.

Evidence is twofold: 1st, Evidence *viva voce*, given by a witness in court, or unwritten evidence: 2d, Written evidence; as deeds, instruments in writing, &c.

1. OF VIVA VOCE EVIDENCE.

Under this head I shall consider, 1. Who may be witnesses: 2. How *viva voce* evidence is to be given.

1. WHO MAY BE WITNESSES.

Every person is by law entitled to be a witness, unless exceptionable for the following incapacities: 1. On account of interest: 2. On account of standing in some relation to the parties in the cause: 3. On account of crimes which destroy his credit: 4. On account of want of discretion. Co. Lit. 69

1. Of Witnesses excluded on account of Interest.

1. The strict notion of objection to a witness, on the ground of interest, is upon the *voire dire*, whether he be to gain or lose by the event of the cause; for a direct interest in the event is a decisive objection to his competence.

As in the case of an informer on a penal statute, in which case the same person cannot be informer and witness, because he is entitled to a part of the penalty, and so is interested in the event. Rex v. Tilly. 1 Stra. 316.

" And that shall be deemed equally an interest which
 " exempts the witness from a charge or loss which he may
 " incur on the event of the suit, as much as the prospect of
 " positive advantage."

Hopkins v.
 Neal.
 2 Stra. 1026.

Therefore a *prochein ami*, by whom an infant sues, cannot be a witness in the cause, for he is liable to the costs; and accordingly in this case he was rejected by *Ld. Hardwicke*.

Per Buller, Just.
 1 Term Rep.
 264.

So in the case of bail, they cannot be witnesses for their principal, because they are directly and immediately interested; for if a verdict be against the principal, they become immediately liable.

2. " But the interest to render a witness incompetent,
 " must be a *certain benefit or advantage* arising to him from
 " the event of the cause, or a certain charge or loss to which
 " he may be liable."

Gos v. Tracey.
 1 P. Wm. 287.
 290.
 Holt v. Tyrrell.
 Pasch. 13 G. 1.
 K. B. at bar.
 Eull. N. P. 284.

Therefore it was decided by *Lord Cowper*, that a grantee, when he appeared to be a bare trustee, was a good evidence to prove the execution of the deed to himself; for a *naked trust* shall not exclude a man from being a witness; and though in such cases it is usual to get a release from the trustee, yet it is not necessary; for in fact such person has no interest to release.

" So that a *future or contingent interest*, or a future and
 " contingent loss, which he may derive or suffer from the
 " event of the cause, shall not render him incompetent."

Smith v. Black-
 ham. Salk. 283.

Therefore it was adjudged in this case, that an *heir apparent* might be a witness to prove the title of lands, but that a remainder-man could not; for this last had a vested interest, but the heirship was a mere contingency.

Carter v. Pierce.
 1 Term Rep. 163.

So where in an action against a *defendant administratrix*, the *co-obligor in the bond to the ordinary* was called as a witness for her; he was objected to, on the ground that he might be liable himself on his bond to the ordinary; but the objection was over-ruled; for *the bare possibility that he might be liable to an action* on a certain event, was no objection to his competency.

Goodtitle lessee
 of Fowler v.
 Welford.
 Dougl. 134.

So where to prove the sanity of the testator the *executor* was called as a witness, and objected to, on the ground that he was interested in supporting the will; as in case it was set aside *he would be liable as executor de son tort*; this was held to be no objection to an executor, who took no other beneficial interest: *tamen quare*, If the interest of the executor in the residuum undisposed of the testator's personal estate is not a sufficient objection, until disproved by evidence, or that he renounces? *Vid. post.*

Rhodes's case.
 Leach, Cr. Caf.
 25.

*For on an indictment for forging a seaman's will, a *person named executor in a subsequent will* was held an inadmissible witness

witness to prove that the name of the testator subscribed to the first will was a forgery; for that went to establish the second will, in which he was named executor.

“ And on the same footing, where the *interest is very remote*, it shall not disqualify the witness.”

For where in trover for three *South Sea* bonds, the case was, That *Ball* delivered them to *Lechmere*, a broker, to sell; he lost them; but having given notice at the *South Sea-house*, they were stopped by the clerk, on being brought there by *Boslock* to receive the interest: *Boslock* brought trover for them against the clerk, and *Lechmere* was called as a witness to prove the property; but it appearing that *he had given a bond to indemnify the company*, he was rejected by *C. J. King* on the ground of interest, *as being liable to the costs*: *Boslock* recovered in that action, and then *Ball* brought an action against him; and *Lechmere* being called as a witness, was objected to, because that if *Ball* should recover against *Boslock*, *that would be set in equity* against the former recovery by *Boslock* against the clerk of the *South Sea-house*: but the Chief Justice said, *that was too remote to exclude him from being a witness, and went only to his credit*; so his testimony was admitted.

Ball v. Boslock,
1 Stra. 575.

So where on a *scire facias* to avoid a patent, an exception was taken to a witness, because he was deputy to the persons who would avoid it; the exception was disallowed, because the suit here was between the king and the patentee.

Owen Harrington's case,
1 Mod. 211.

3. “ Though the witness may not have any interest in the cause wherein he is called as a witness, yet if in its event he may be *ultimately benefitted*, he shall be inadmissible.”

As *ex gr.* if both party and witness claim any matter under the same title or in the same right; or if the determination of the cause depending, may perhaps prevent a suit against the witness.

As in actions upon policies of insurance, it has been said, that one underwriter cannot be a witness for another whose name is on the policy. This is so laid down in the 1 *T. R.*, but *vid. S. C. 4 Burr.* 2245., where it is said that it was decided, That the objection went only to the credit, not to the competency of the witness. *Vide Bent v. Baker*, 3 *T. Rep.* 27. & *post.* 714.

East India Com. v. Gosling,
M. 16 G. 2. cit.
1 Term Rep. 303.

So where the two defendants were part owners of a ship, of which the plaintiff was husband, and appointed to that office by a deed executed by all the owners, by which deed they empowered him to expend money generally for the use of the ship; he insured for all the owners, and brought separate actions against two of them: they were each of

French v. Blacke
house.
Same v. Foulston.
5 Burr. 2727.
* [706

them charged for the amount of the whole sum. On the trial of the first action, the defendant in the other action was called as a witness; Lord *Mansfield* rejected him as incompetent; and on a motion for a new trial, the Court concurred with him.

Corporation of
Carpenters, &c.
of Shrewsbury
v. Hayward.
Doug. 359.

So where the action was against the defendant for following a trade against the custom of the town of *Shrewsbury*, without being free of one of the companies, the plaintiffs in this action; a witness was called to prove that *he* had worked in *Shrewsbury* without being so admitted a member of any of the companies, and so to disprove the existence of the custom: he was held to be an inadmissible witness; for though not immediately interested in the event of the suit, yet by the company's failing in establishing the custom, he and others who had been guilty of a breach of it, would be discharged from actions to which they were liable.

On this principle the tenant in possession is no evidence for his landlord in ejectment. (*Ante*, fol. 448.)

1 Stra. 658.

So where the question is respecting the rights of lords of customary manors, the lords of other customary manors are inadmissible witnesses, because the question concerns a general right.

Per Buller, Just.
1 Term Rep.
302.

The case of commoners comes within the rule now mentioned; as to whom it is laid down generally, that one commoner cannot be a witness for another; but the admissibility of their testimony seems better founded on this rule: If the issue be on the right of common, which depends on a custom pervading the whole manor, the evidence of the commoner is not admissible, because, as it depends on a custom, the record in that action would be evidence in a subsequent one brought by that witness to try the same right: but the reason does not hold where the common is claimed by prescription in right of a particular estate; because it does not follow, that if *A.* has a prescriptive right of common belonging to his estate, that *B.* who has another estate in the same manor, must have the same right; neither would the judgment for *A.* be evidence for *B.*

Bull. N. P. 285.

But it is no good exception to a witness, that he has common *pur cause de vicinage* of the lands in question; for this is no interest but an excuse of a trespass.

Rex v. Proffer.
4 Term Rep. 17.

[707]

But it may be considered as an exception to this rule, the admission of a person liable to be rated, but not actually rated, in a question on an appeal respecting a poor's rate; for such person is a good witness, though he may be ultimately benefitted by extending the rate to others. Perhaps it is on the ground that *it is uncertain* whether he will receive the benefit or not, as *per Lord Kenyon* in this case: The poor's rates

rates are made for a short space of time only; and persons who are liable to be rated one month, may not be so the next.

The first case in which the question occurred was before Baron *Burland* at *Salisbury*, in which on an action on a penal statute, which gave part of the penalty to the poor of the parish; a person was called as a witness, who was liable to be rated to the poor, but was not rated; he was objected to, but the Judge over-ruled the objection, holding *liability to be rated to be no objection*. Per Buller, Just. 4 Term Rep. 20.

So in an action on a bond entered into by the defendant as security for a person on his being appointed collector of watch rate, &c.; the vestry clerk was called as a witness: on his being asked if he was not liable to be rated, he answered, that he supposed he was; but that it had never been usual to rate the vestry clerk; and his evidence being objected to on this, Lord *Kenyon* held, That the rule laid down in *Rex v. Proffer* equally applied to a case of this nature; and he was admitted. *Chivers v. Brand. Espin. N.P.Caf. 175.*

4. "If a witness *thinks himself interested*, that is, that a benefit will arise to him from his testimony, though in strictness of law he has *no right* to such benefit, he should not be admitted as a witness."

As where *A.* having money of the plaintiff's in his hands, lost it at play, the plaintiff brought his action on the stat. of *Ann.* against the winner, and produced *A.* as a witness: upon a *voire dire* he confessed, that if the plaintiff recovered, he was not to be answerable; but if he failed, that the money was to be deducted out of his fortune in the plaintiff's hands. Per *Pratt, C. J.*—Though the recovery in this action will not sink the demand against *A.* for the money he has embezzled, yet as in his apprehension the plaintiff will not trouble him for it in case he recovers, it is a bias on him; and if he thinks himself interested he ought not to be sworn. *Fotheringham v. Greenwood. 1 Stra. 129.*

In the same case Serjeant *Darnall* mentioned the case of *Ibid.* a Mr. *Chapman* of *Bucks*, who owning himself to be under an honorary, though not a binding obligation to pay the costs of the action in which he was produced as a witness; *Parker, C. J.* on solemn debate rejected him.

5. "The interest which amounts to a disqualification must, it seems, mean the obtaining of some profit bettering the witness's condition or estate; *not the interest arising from establishing an higher character, or exculpating himself from a charge of misconduct or neglect.*"

Therefore where in an action on a policy of insurance, with warranty to depart with convoy, in which the plaintiff was nonsuited, the ship having neglected to obey the signals made for joining the convoy, in consequence of which *Taylor v. Woodnefs. Sittings G. Hall, Hil. 4 G. 3. MSS.*

which she had been captured; some imputation was attempted to be thrown on the captain of the convoy: he was called then as a witness and objected to, on the ground that he was interested to support his own conduct; but Lord *Mansfield* over-ruled the objection, saying that he had often done so before.

Per L. Mansfield.
1 Term Rep.
300.

6. "It has been said, that no person who has signed a paper or deed shall be permitted to give a testimony to invalidate it; for every man who is party to any instrument gives a credit to it, and by such means he might discharge himself. And this is the case, though he has no *immediate interest* in the event of the suit in which he is called."

Walton Aff.
of Sutton v.
Shelley.
1 Term Rep.
296.
Rex v. Rhodes,
2 Stra. 728.
S. P.

Therefore where in debt on a bond the defendant pleaded usury: it was proved, that the bond had been given in consideration of the delivering up two promissory notes, which had been indorsed to *Sutton* the bankrupt, and one of the indorsers on which was a person of the name of *Davenport Sedley*; to prove that the consideration of the notes was usurious, the defendant called *Davenport Sedley*; but he was rejected as an incompetent witness, on the ground that he came to impeach an instrument on which his name appeared; though it was admitted, that in point of interest he had none, or that it was rather against his interest; as if the bond was established, the notes upon which his name appeared were at an end.

The doctrine laid down in this case seems rather invalidated by a decision of Lord *Kenyon's* in *Rich v. Topping*, *Esplin. Caf. N. P.* 176., which was an action on a bill of exchange, the defence to which was, that the consideration of the bill was an usurious transaction, to prove which the drawer, who was also the indorser, was called as a witness, and objected to on the authority of that case; but Lord *Kenyon* over-ruled the objection: his Lordship said, That the verdict in this cause could never be given in evidence in any action afterwards, to be brought against the witness as drawer of the bill, so that he was completely uninterested in the event of the action; and on his receiving a release from the acceptor, his Lordship admitted him.

Hart v. McIntosh.
Esplin. Caf. N. P.
298.

But in a similar case in the Common Pleas, *Buller, J.*, said, That the rule in the case of *Walton v. Shelley* had been laid down by Lord *Mansfield*, and decided by the Court, and that he would adhere to it; and accordingly rejected a witness under similar circumstances.

"But where a person is uninterested in the immediate question; that is, at all events liable himself, he may be called to impeach that instrument upon which his name appears, *as between other parties.*"

Therefore

Therefore where the plaintiff declared as an indorsee of a promissory note drawn by *Foster Charlton*, payable to the defendant, dated the 13th of *June 1775*; the defendant insisted, that the date of the note had been altered from the third to the 13th; and to prove it, called *Foster Charlton*: Lord *Mansfield* admitted him, as at all events he was liable to pay the note.

Levi v. Effex.
Sittings Westm.
Mich. 1775.
MSS.

"But though the law is laid down generally by Lord *Mansfield* (*supra*), That no person shall be admitted to give a testimony to invalidate any instrument which he has signed; yet in the same case Justice *Buller* confines it only to *negotiable instruments*; and this distinction is recognized by Lord *Kenyon*, 3 *Term Rep.* 34.; in which his Lordship mentions as an instance, that witnesses may be called to give evidence against their own attestation, the case of *Joliffe's will* (*Lowe v. Joliffe*, 1 *Black. Rep.* 365.); and so one witness has been allowed to prove the execution of a will attested by three witnesses, which the other two have denied. So that to negotiable instruments only the rule should be confined: though the rule as to these seems now to be the same as in all other instruments." *Ante* 708.

4 Burr. 2225.
[709]

"So neither shall a person be allowed to give a testimony as to the illegality of a transaction, in which a personal trust or confidence has been placed in him."

Therefore where to debt on a bond the defendant pleaded the stat. 5 & 6 *Edw. 3.* against the sale of offices, and upon the trial, the person who had been entrusted to make the bargain, and to keep it secret, was called as a witness to give an account for what the bond was given; Lord *Holt* refused to admit him, it being to abuse and betray his trust.

Holt v. Tyrrell.
Pasch. 3 G. 1.
B. R. at bar.
Bull. N. P. 284.

7. "If a person claims a property in the instrument upon which the action is brought, that is such an interest as shall render him incompetent, even with a release."

As where in assumpsit by the plaintiff as indorsee of two promissory notes against defendant as acceptor, the defence was, that the bills were accommodation paper, which was known to the plaintiff, and that he had given no consideration for them; the indorser of the bills was called as a witness, he having been released: he proved that having accepted two bills for *Tankard* the defendant; *Tankard* had accepted the two bills in question for him as a counter-security; that he, being unwilling to press *Tankard*, or sue him in his own name, requested the plaintiff to take the bills, to pretend to *Tankard* that they had been indorsed to him for a good consideration, and to threaten to sue him if they were not paid; that the plaintiff consented, and that he then indorsed them to the plaintiff, but had never received any consideration for them; that the plaintiff had commenced this action in breach of his agreement, and that the bills were *bona fide* his (the witness's) property. Upon this Lord *Ken-*

Buckland v.
Tankard.
5 *Term Rep.*
578.

yon said, his evidence was inadmissible, as he had an interest upon which the release could not operate; for that if the plaintiff succeeded in this action, the bills were *functi officio*, and so were lost to him; but his testimony went to defeat the plaintiff's action, in which case the bills will remain undischarged, so that by impeaching the plaintiff's title he set up his own, and was therefore interested: his Lordship's opinion was afterwards confirmed by the Court of *K. B.*

"But a suggestion that a witness may be liable, shall not "incapacitate."

Birt v. Hood.
Espin. Caf N.P.
20.

In an action for goods sold and delivered, the defence was, that the defendant's mother carried on the business, and that the goods for which the action was brought was furnished to her and on her credit: it was asserted by the plaintiff, that though the mother did so carry on the business, the defendant was a partner with her in it. The mother was called as a witness to prove the defendant's case: it was objected to her testimony being received, on the ground that, being a partner, and therefore liable to contribution in case the verdict went against the defendant, she was thereby rendered incompetent; at all events that some other witness should be called to prove that there was no partnership subsisting. *Eyre, C. J.*, over-ruled the objection, holding that as the plaintiff had proceeded against the defendant only, he could not now upon that surmise incapacitate the witness, who came to charge herself.

Bull. N.P. 285.
Alan v. Jordan.
1 Ver. 161.
3 Chanc. Caf.
123. S. P.

8. "On the same principle, in no case can the plaintiff "or defendant be a witness in his own cause, as he is "most immediately interested; therefore an answer in "equity is of very little weight where there are no proofs "in the cause to back it; but if there be but one witness "against a defendant's answer, the Court will direct a trial "at law to try the credibility of the witness; and in such "case will order the defendant's answer to be read to the "jury."

Neither can they be witnesses for or against each other.

1 Sid. 441.
Bull. N. P. 285.

But if a material witness for the plaintiff be made by mistake a defendant, the Court will, on motion, give leave to omit him, and strike his name out of the record even after issue joined; for the plaintiff can in no case examine a defendant, even though nothing be proved against him.

Bull. N. P. ibid.

Therefore where on an information for a misdemeanor, the Attorney General would have examined a defendant as a witness for the king, the Court refused to admit him; he then entered a *noli prosequi*, and then examined him. *Vid. Cosgrove v. Hill, ante, 319.*

Rex v. Fletcher.
1 Str. 533.

So where two were indicted for an assault, and one submitted, and was fined one shilling, the *C. J.* admitted him as a witness for the other.

But if any person be arbitrarily made a defendant, in order to prevent his testimony, it is said, that if there is no evidence against him, he may be sworn and examined as a witness; but *quare*, If there should not be a verdict taken for him, as it said before, that a defendant cannot be a witness on either side? and in this case it is said, that if a material witness for the defendant in ejectment be made a defendant, the right way is for him to let judgment go by default; for if he pleads, and by that means admits himself to be tenant in possession, the Court will not on motion afterward strike out his name; but in such case, if he consents to let judgment go against him *for so much as he is in possession of*, there seems no reason why he should not be admitted as a witness for another defendant.

Bull. N. P. 285.

Dormer v.
Fortescue.
Mich. 9 G. 2.
Bull. N. P. 285.
[710]

“ If an action is brought against one defendant for a cause of action *simul cum* others, those persons may be witnesses for the defendant; but *aliter*, where they have been made parties to the suit.”

In trespass the defendant pleaded *actio non*, &c., for that Richard Mawson named in the *simul cum*, paid the plaintiff a guinea in satisfaction; on issue thereon, the defendant produced Mawson, and C. J. Eyre admitted him as a good witness; for what he was to prove could not be given in evidence in another action, and in effect he was making himself liable by swearing he was concerned in the trespass.

Poplet v. James,
Trin. 5 G. 2.
Bull. N. P. 286.

But it was decided in this case, that if the plaintiff could prove the persons named in the *simul cum* in the trespass guilty, and parties to the suit, which must be by producing the original or process against them, or proving an ineffectual endeavour to arrest them, or that the process was lost, the defendant in that case cannot have the benefit of their testimony.

Reason v.
Ewbank.
Hil. 1 G. 1.
per Bur. Just.
&c. Str. 19.
Bull. N. P. 286.

9. But though interest is thus a complete objection to the competence of a witness, yet it is to be taken with some exceptions.

1. In *criminal prosecutions* a party interested may be a witness.

It was formerly held, That where a party liable to a civil cause of action preferred an indictment for the same cause of action, in order to defeat it, that such person was an incompetent witness.

And accordingly, in an information for a cheat, the case was that the defendant had a promise of a note for 5l. from his mother-in-law, but by some slight got her hand to one for 100l.; it was ruled by C. J. Holt, That the mother-in-law could not be a witness, being concerned in the event of the suit, for that if sued on the note for 100l, a conviction of the defendant on this indictment would influence the jury, though

Rex v. Whiting.
Salk. 283.
Mich. 10 W. 3.

though the conviction could not be given in evidence before them.

Rex v. Nunez.

2 Stra. 1043.

Pal. 9 G. 2.

Rex v. Ellis.

2 Stra. 1104.

* [[711]

* So in an indictment for perjury in an answer to the exchequer, by which the defendant swore that a note on which he had sued the plaintiff was to be put in suit, and that there was no agreement by which he bound himself not to sue the plaintiff, who had filed an injunction bill in the Exchequer on that ground: Lord *Hardwicke*, C. J., refused to allow the plaintiff to be a witness.

Rex v. Eden.

Esplin. Caf. N.P.

97.

In an indictment for perjury in what the witness swore on a former trial, the party against whom the verdict went in consequence of such testimony was held to be inadmissible, until he had paid the debt and costs in that action, as in case of a conviction, a court of equity would relieve him against the judgment given in that action, it having been obtained by perjury.

Per Ld. Mansfield.

4 Burr. 2255.

But since these cases, great light has been thrown upon the distinction between interest which affects the competency of a witness, and influence which only goes to his credit. In the case of *Rex v. Bray*, Hil. 1736., Lord *Hardwicke* shook the authority of the *King v. Whiting*, and that of the *King v. Nunez*, which he himself had decided; and afterwards in the case of the *King v. Broughton*, 2 Stra. 1229., C. J. *Lee* over-ruled the cases of *Rex v. Whiting*, *Rex v. Nunez*, and *Rex v. Ellis*, above cited.

The rule, therefore, as laid down by Lord *Mansfield*, was,
 “ That the question in a criminal prosecution being the same
 “ with a civil cause, in which the witness was interested,
 “ went generally to his credit, unless the judgment in the
 “ prosecution where he was a witness could be given in evi-
 “ dence in a cause in which he was interested:” in which case I conclude he would be incompetent.

Abrahams *q. t.*

v. Bunn.

4 Burr. 2257.

Shank *q. t. v.*

Payne.

1 Stra. 633.

contra.

Therefore an action on an usurious contract, to prove the usury, the borrower of the money was called: after having proved the usury, he was objected to as incompetent, *unless the repayment of the money was proved*, and that he was not competent to prove the repayment of it; but it was resolved, That he was a competent witness to prove payment of the money borrowed; for neither what he swore in this action, nor the recovery, could be evidence in an action of debt for the money; and it was also held, That he was competent to prove the usurious transaction, though it would be liable to a different consideration, *if the defendant could produce the security, or prove the debt unpaid.*

“ But though it is said that in the *King v. Bray*, *supra*, it
 “ was first held, That a person interested was admissible as
 “ a witness, yet that seems not correct; for in many cases

" before that time, a person interested was admitted as a witness in cases of necessity."

For where in an indictment for a cheat done to J. S. by imposing upon him a quantity of beer, mixed with vinegar and grounds of coffee, for port wine; C. J. Holt allowed J. S. to be a witness to the fact on the trial; for that in such private transactions nobody else could be a witness to the circumstances of the fact but he who suffered.

Rex v. Mac-
kartyne.
Salk. 286
Mich. 2 Ann.

* So on an indictment for tearing a note, whereby the defendant promised to pay A. B. so much; A. B. was produced as a witness; he was objected to on the ground that he was swearing to set up his own demand, because that if the defendant was convicted, the Court would compel him to give a new note; but C. J. Pratt admitted him.

Rex v. Moise.
1 Stra. 595.
Trin. 10 G. 2.
* [712]

So in this case it was said by C. J. Holt, That if a woman give a bond or note to a man to procure her the love of J. S. by some spell or charm; that on an indictment for a cheat, she shall be a witness, though it goes to invalidate and destroy the bond or note; for the nature of the transaction admits no other evidence.

Per Holt.
7 Mod. 119.

2. " A second description of persons interested who are legal witnesses, are those *who by statute* are declared to be so, notwithstanding the interest: or those whom the policy of statutes giving them an interest requires to be so admitted."

1. As by stat. 27 G. 3. c. 29. " It is enacted, That in actions on penal statutes, *inhabitants of any place or parish* are good witnesses to prove the offence, notwithstanding the penalty be given to the poor, or otherwise for the benefit of the parish or place, provided the penalty does not exceed twenty pounds.

Rex v. Davis:
6 T. Rep. 177.

2. The inhabitants of the county at large being bound to repair bridges, except where any person is obliged to repair *ratione tenuræ*, in which case the inhabitants of the county could not be witnesses on indictments for not repairing them; it was therefore enacted by stat. 1 Ann. 88., " That on all such indictments, either in the courts at *Westminster*, or at the *Quarter Sessions*, the evidence of the inhabitants, being credible persons of the town, corporation, county, or riding in which such decayed bridges or highways leading to them lie, should be taken and admitted in all such cases."

By stat. 13 G. 3. c. 78., the Highway Act, the overseer is by § 69. declared to be a competent witness in all cases of matters arising under the act, though his salary may arise in part out of the fines and penalties.

" 3. By

3. By stat. 8 G. 2. c. 16. § 15. it is recited, "That no person inhabiting within the hundred could be admitted as a witness for or on behalf of the said hundred on actions brought against them on the statute of *Winton*; it therefore enacts, that all such persons may be witnesses in such actions."

4. By stat. 3 & 4 W. 3. c. 11. it is enacted, "That in all actions brought in the courts at *Westminster*, or at the assizes for money mis-spent, or taken by the churchwardens or overseers of the poor, the evidence of the parishioners, others than such as take alms, shall be taken and admitted."

2 Hawk. P. C.

433.

* [713]

*5. On an indictment for perjury, if the indictment is at common law, the party injured may be a witness (*ante*); but where the indictment is *on the statute*, the party injured cannot, *for the statute gives him 10l.*

6. But the law has admitted many persons to be witnesses, whom interest might otherwise incapacitate, as in cases of offences, for which a *reward* is given; as statute 4 & 5 W. 3. c. 8. for apprehending highwaymen; 5 Ann. c. 31. for apprehending burglars, &c., notwithstanding which the prosecutors and persons apprehending those guilty of these offences, are good witnesses on the indictments them.

Rex v. Dylone.

Sitt. West. Tr.

7 Geo. 3.

Onslow, N. P.

257.

So where the indictment was against a *Roman Catholic* priest for assisting in celebrating mass; the prosecutor was produced as a witness, but was objected to, a reward being given to any person who shall convict a *Popish* bishop or priest of that offence: but Lord *Mansfield* over-ruled the objection, and said it was the constant practice to admit the prosecutors on an indictment for a highway robbery or burglary, though they are entitled to the reward.

3. "A third case in which a party interested may be a witness is *from necessity*, where no other evidence can reasonably be expected to be had."

Bull. N. P. 289.

As in an action on the statute of *Winton* against the hundred, the person robbed may be himself a witness. *Vid.* Preamble, § 15 stat. 8 G. 2. c. 16. *ante*, 712.

Rex v. Ford.

3 Salk. 690.

So the party escaping may be a witness to charge the gaoler with an escape; for it is a matter privately transacted between the party and the officer, of which there could be no other evidence.

Rex v. Phipps

& Archer.

Cambr. Per Lee,

C. J.

Bull. N. P. 289.

So where the question was, Whether the defendants had a right to be freemen? though it appeared there were commons belonging to the freemen, yet an alderman was admitted to prove them no freemen, it appearing that none but

but aldermen were privy to the transactions of the corporation respecting the making persons free.

So where the question was, Whether the master had deserted the ship *Suffex*, without sufficient necessity? a sailor, who had given bond to the master (as a trustee for the company) not to desert the ship during the voyage, was admitted an evidence for the master, it appearing that all the sailors had entered into such bonds.

East India Com-
pany v. Gol-
ling.
16 G. 2.
Bull. N. P. 289.

So where a son, having a general authority from his father to receive money, received a sum of money belonging to his father, and gave it to the defendant: in trover for it by the father, the son was held to be a good witness by C. J. *Holt*, his testimony being corroborated by other circumstances.

Anon.
Salk. 289.

[714]

4. " A fourth case in which a witness interested may be admitted to give his evidence, is grounded on the usage of trade, and the usual mode of business."

As a porter is a good witness to prove the delivery of goods; a banker's clerk, the payment of money; Bull. N. P. 289.

As where a banker's clerk had overpaid a bill, on *assumpsit* brought for the money by the banker, the clerk was *ex necessitate* and from the usage of trade admitted as a witness, though in case the money had not been recovered, he must have made it good.

Martin v.
Horrell.
1 Stra. 647.

So a factor who made the agreement was held to be a good witness to prove the delivery of goods according to agreement, though he was to have a shilling in the pound; for he was a mere go-between, and so might be a witness for either party.

Dixon v. Cow-
per.
3 Will. 10.

And in a similar case, where a person was employed to sell a quantity of indigo for the plaintiff, and by agreement was to have for his own profit whatever sum he could get for the indigo above 2s. 6d. *per* pound, which price the plaintiff had fixed himself, and not an allowance of so much *per cent.* on the sale, as was the usual way; he was held to be a good witness without a release, on the authority of the last case.

Benjamin v.
Porteus.
2 H. Blackst.
590.

5. " A fifth case in which an interested person may be a witness, is where the party is become interested by his own act, after the party who calls him as a witness has a right to his evidence."

As where in *assumpsit* on a policy of insurance, the defendant (the underwriter) produced one *Bowden* as a witness, he *had been the broker* employed by the plaintiff to get the policy effected, and *after it had been so underwritten by the defendant, he underwrote it himself*; on this ground he was objected to (*ante*, fol. 705.); but he was nevertheless held

Bent. v. Baker.
3 Term Rep 27.

to be a competent witness: for having been employed as broker, from the nature of his situation he was the best witness that could be of the transactions; and therefore he should not be allowed to deprive the parties of the benefit of his testimony by any act of his own; particularly as so by collusion with the assured, by putting his name on the policy, he might defraud the other underwriters, by depriving them of the benefit of his testimony to facts which might avoid the policy.

“ For the objections in these cases go only to credit.”

Barlow v.
Vowell.
Skin. 586.

As if a person be a witness to a wager, upon which an action is brought; if he has laid a wager on the same matter at the same time, he is not admissible as a witness; but if the wager was laid by the witness *afterwards*, he is a good witness.

Rex v. Fox.
1 St. a. 65.

So on an indictment for an assault, it was proved that the prosecutor had laid a wager that he would convict the defendant; he was held to be a good witness, though it went to his credit.

[715]

6. “ A party interested may be a witness where his interest is very remote or trifling.”

As in the cases *ante*, fol. 705.

Rex v. Mayor
of London.
2 Lev. 231.
Tamen quære,
If this case be
law?
Bull. N. P. 290.
2 Vern. 317.

So in this case, which was an information *quo warranto*, for taking one penny *per* chaldron on all coals brought into London; the defendants prescribed for the duty; freemen were admitted to prove the prescription, it appearing that all the profits went to the mayor and sheriffs, though they had it for the benefit of the corporation of which the freemen are all members; yet they having an interest so small and so remote, were held to be admissible witnesses.

The above case is put with a *quare* as to its legality; and it seems not to be law from the following case:—

Burton v.
Hinde.
5 T. Rep. 174.

In trespass for breaking and entering the plaintiff's close, which was formerly part of the waste of *Kingston*, the defendant justified under a right of common: the plaintiff replied an approvement under the stat. of *Merton*, which had been made by the corporation of *Kingston*, who were lords of the manor, and had inclosed it out of certain waste land in which the defendant and others had a right of common, reserving a rent to the corporation. The issue was on the sufficiency of common left: to prove it the plaintiff offered to call certain *freemen of the corporation*; they were objected to and rejected, and the plaintiff was nonsuited. On a motion for a new trial it was contended that they were admissible; 1st, Because the rent was reserved to the mayor and bailiffs, and that therefore the freemen having no disposition of the corporate funds, had no interest at all: 2dly, But if they had, that it was too minute to operate as an objection to their testimony.

testimony: but *per Curiam*—The rent must be reserved to the use of the corporation, and therefore the objection must prevail, however small the interest.

“ So if the interest is trifling.”

On an information *quo warranto* against the defendant as mayor of *Tintagel*, issue was joined on this custom, *viz.*—That at a court-leet, annually holden on the 10th of *October*, the mayor for the year ensuing is to be chosen, and for that purpose two elizors are to be nominated, one by the mayor, the other by the town-clerk; these elizors are to nominate twelve jurors, who are to present the mayor for the year ensuing, and in case the town-clerk refuse to nominate his elizor, that then the mayor may nominate the second elizor; the town-clerk did not nominate, upon which the mayor nominated *P. Hoskins*: *this man, and another who had served as a juror*, were offered as witnesses at the trial to prove the custom, but rejected *in toto* as incompetent; but *per Lord Hardwicke*, on a motion for a new trial, which was granted—The having an elizor is intended as a franchise in the borough; but in the elizor himself *it is only an authority, and the execution of it past and over*. He said he knew no case where a man who has acted under a bare authority has been refused to prove the execution of it: persons who have been themselves in office are often called to shew what the usage is, what they did when in office; and yet, if their acts are not legal, they are liable to informations *quo warranto*.

Rex v. Bray.
Hil. 10 G. 2.
Bull. N. P. 290.
Rex v. Robins.
2 Stra. 9069.
S. C. Semble-
ment.

And in the last case, *Ld. Hardwicke* recognized this case as good law, *viz.* that in an issue to try whether by the custom of the manor, the tenants were to pay fines to the heir or successors of the lord during his minority, and be re-admitted upon the death of the last admitting lord, *the steward* was admitted to prove the custom, *though he had fees on the admission*.

Champion v.
Atkinson.
3 Keb. 90.

So a person, who had sold an estate without any covenant for good title or warranty, was allowed to be a witness to prove the title of the vendee.

1 Stra. 445. |

7. “ And lastly, however a person may be interested, if “ before he gives his testimony he parts with his interest “ by a release or otherwise, he is restored to his competency.”

[716]

As a legatee is a good witness *against a will*, for he swears against his own interest, which he parts with by impeaching the will.

Oxendon v.
Penrice.
2 Salk. 691.

So a legatee by a *release* is a good witness to establish a will.

1 Curr. 423.

Bent v. Baker.
3 Term Rep. 27.

So in this case (*ante*, fol. 714.) where the broker, who had also underwritten the policy, was called as a witness, and was objected to on the ground, first, That he *expected to be called on for part of the expence of defending the action, in which he was called as a witness*; and secondly, That he had joined the defendant and the other underwriters in a bill in the Exchequer for a discovery of matters respecting the policy, and for avoiding the same, which bill was then depending, and to the expences of which he was liable; it was adjudged, *That the defendant by executing to him a release of all costs at law and equity, paying the plaintiff his costs at law and equity, and procuring the bill in equity to be dismissed, restored him completely to his competence.*

Goodtitle lessee
of Fowler v.
Welford.
Doug. 134.
Lowe v. Jol-
iffe.
1 Black Rep.
365 S. P.

So where in ejectment by a devisee under a will, one *Hearle*, who was named executor in the will, and was also devisee of a reversionary interest expectant on an estate for life, in some copyhold lands part of the estate devised, was called as a witness on the part of the plaintiff to prove the sanity of the testator, which was impeached by the defendant; to obviate the objection of interest, *he had surrendered his estate in the lands to the use of the heir at law*, but he had refused to accept it: it was resolved, that by parting with his interest his competency was restored, nor *should the heir, by refusing to accept the surrender*, deprive others of the benefit of his testimony.

Masters q. t. v.
Drayton.
2 Term Rep.
496.

But in this case, in an action *qui tam* for usury against the defendant, who was assignee of *Lightfoot* a bankrupt; *Lightfoot* was called as a witness: on his *voire dire*, he confessed that he had not obtained his certificate, nor repaid the money, but that the defendant had proved the debt under his commission; *Lightfoot* offered a release of all claim of allowance, surplus, &c. to his assignees, but he was nevertheless rejected as incompetent; for, notwithstanding the release, the defendant might still arrest him for the whole debt at law.

[717] 2. Of Persons inadmissible as Witnesses from Situation, as standing in some Relation to the Parties in the Cause.

These are, 1. Counsel and attornies: 2. Husband and wife.

1. How far Counsel and Attornies may be Witnesses.

Lindsay v. Tal-
bot.
Trin. 12 G. 1.
Bull. N. P. 284

1. Counsel and attornies ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; *and this is the privilege of the client, not of the counsel or attorney; for it is contrary to the policy*

policy of the law to permit any person to betray a secret with which the law has intrusted him.

2. "But the rule now laid down is confined to cases only in which the facts to which the counsel or attorney is called *have been communicated to him in the course of business, in instructing him professionally respecting the cause.*"

For 1st, "A counsel or attorney may be called to prove any fact or matter *which they knew before their retainer; for as to that matter, they are in the same situation with other persons.*" Bull. N. P. 284.

2. They may be called to prove *a fact of their own knowledge*, of which they might have had knowledge without being counsel or attorney in the cause.

As if the question was concerning a rasure in a deed or will—they may be examined to the question, *Whether they ever saw such deed or will in a different plight?* for that is a fact of their own knowledge; but they should not be examined as to any confessions their client may have made to them respecting it. Ld. Say & Selw's case. Mich. 10 Ann. Per Sir O. Bridgman, with advice of all the Judges.

So they may be examined as to the true time of the execution of a deed. Bull. N. P. 284. Ibid.

So where in ejectment brought on an agreement, to which the defendant's attorney was a witness, he was subpoenaed, but refused to give evidence; in consequence of which the plaintiff was nonsuited: the Court granted an attachment against him; for a person attesting any instrument is bound to prove its execution; *nor is such incompatible with his situation as attorney for the opposite party.* Doe v. Andrews. Cowp. 845.

In this case on an indictment for perjury, in an answer in Chancery, it was held, That his attorney, who was with the defendant when he took the oath, could not be admitted to prove the identity of the person, and the fact of his taking the oath; but it is said by Lord Mansfield, Cowp. 846. and Bull. N. P. 284. to be otherwise: on the ground that such is a collateral matter, and not communicated to him by his client professionally, but a fact which he might know of his own knowledge. Rex v. Watkinson. 2 Stra. 1122.

[718]

3. "So neither shall the attorney be obliged to produce papers, or such like, which may have been delivered to him by his client, as evidence against him; for such would be equally contrary to the policy of the law."

Therefore on a motion for an attachment against the defendant, for not producing under a subpoena *duces tecum*, certain vouchers which one Peach a client of the defendant's had produced before a master in Chancery; and this subpoena *duces tecum* was for the purpose of founding a prosecution

secution for forgery against *Peach*; Lord *Mansfield* and the rest of the Court held clearly, That he was not only not bound to obey the subpoena, but that, on receiving it, he should have delivered the papers over to his client.

4. "So the facts to which the attorney is bound not to disclose must be *communications made by the client pending the suit*, as instructions to him in the conduct of it; for if matters are disclosed to him *after the end of the suit*, though they respect it, he may be called on to give evidence of these."

Cobden v.
Kendrick.
4 Term Rep.
431.

As where the present defendant had brought an action against the present plaintiff, on a promissory note for 150*l.*, and had obtained an interlocutory judgment, and executed a writ of inquiry, but had compromised it before execution, by taking part of the money from the plaintiff, and his warrant of attorney to confess a judgment for the remainder. Before this became due, *Kendrick* told *Allen* his attorney, that he was glad it was settled, for that he had only given 10*l.* for the note, and that he knew it was a lottery transaction. This action was therefore now brought to recover back the money paid by *Cobden* on settling the first action, on the ground of want of consideration for the note; and its being known to *Kendrick* when he took it. *Allen* was called as a witness, and objected to; but Lord *Kenyon* admitted him, holding the above distinction as to the mode and time of the communication; and the Court of *K. B.*, on a motion for a new trial, concurred in the distinction.

5. "And this privilege is strictly confined to persons acting in the situation of attorneys or counsel in the cause, and cannot be extended to others, though professionally and confidentially employed."

Wilson v.
Rastall.
4 Term Rep.
75.

[719]

For where in an action against the defendant, for bribery at the election for *Newark-upon-Trent*, by himself and his agents, one of whom was one *W. Handley*; *W. Handley* was called and examined as to certain letters received from the defendant respecting the election: these letters were proved to be in the hands of Mr. *B. Handley*, an attorney: he was called, and proved that he had received them from a Mrs. *Handley*, who had them from *W. Handley*; but *W. Handley* knew of his having them, and desired him to destroy them. He further proved, that he was not concerned as attorney for *W. Handley* (nor could he, being under-sheriff) in any cause whatever, neither had he employed any attorney for *W. Handley*, but that *W. Handley* had consulted him confidentially in his profession, and had applied to him before and after the receipt of the letters: that he consulted both with *W. Handley's* attorney by his direction, and with *W. Handley* himself; and that these letters were communicated to him in consequence of the defendant's consulting him professionally.

The

The Court held clearly, That *B. Handley* was not privileged as an attorney to withhold the letters as evidence on the trial.

And the attorney or counsel is not only prevented from disclosing any matter communicated to him by his client, *where the action is against his client*, but cannot give evidence of it *in any case whatever*; therefore it was agreed in the last case, that had *B. Handley* been considered as the attorney of *W. Handley*, he could not have given the letters in evidence *against Rastall*.

Per Buller, Just.
in S. C. 4 Term
Rep. 760.

6. But an attorney may be called merely to prove his client's hand-writing to a note, or such instrument, as I have seen in practice.

So where to a debt on bond the defendant pleaded usury, and to prove it called the plaintiff's attorney; it was objected to as a case of confidence; but Lord *Kenyon* ruled, That it was not within the rule, which extended only to cases of matters communicated by the client, but not where he himself was a party to the original transaction; that did not come to his knowledge by communication from his client, and he was liable to be called to prove it.

Duffin v. Smith.
Peake, N. P. C.
108.

7. And this privilege of not being compellable to divulge secrets professionally disclosed to them, is confined to *the attorneys and counsel only*, and does not extend to *persons of other professions*: for where on the trial of the *Duchess of Kingston*, Sir *Cesar Hawkins*, the surgeon, was called to speak to some matters wherein he had been employed as a surgeon by the *Duchess*, and objected to speak to them, he was ordered by the Court to do it, they holding that he had no such privilege.

Duchess of
Kingston's case.
11 State Trials,
243.

2. How far Husband and Wife may be Witnesses.

1. These being one person in the consideration of the law, and their interest absolutely the same, they cannot be witnesses *for each other*, nor *against each other*, on account of its being likely to create disputes, and so against the policy of marriage.

Co. Lit. 6. b.

In this case, which was an action by *the plaintiff as a feme sole* for goods sold, &c.; the defendant called *the husband* as a witness to prove *that she was a married woman*; he was admitted, and the plaintiff nonsuited; but the Court set aside the nonsuit, holding him to be an inadmissible witness.

Bentley v. Cook.
Trin. 24 G. 3.
quoted 3 Term
Rep. 265.

[720]

2. " And this rule is founded on the policy of the law,
" not on the ground of *interest*."

Davis v. Din-
woody.
4 Term Rep.
678.

For where in an action against the sheriff of *Monmouth*, to recover certain household goods, taken by him under an execution against *J. Lewis*, on the ground that those goods, under the marriage-settlement of *J. Lewis*, had been settled to the sole and separate use of *J. Lewis's* wife; and the action was by the executor of the surviving trustee: *J. Lewis* was called as a witness, and was admitted on the ground *that he came to swear against his own interest*; as by shewing the goods not to be his own, he was prevented from discharging by them the execution against himself: but the Court held, That he was inadmissible, as coming to give evidence on a matter respecting the interest of his wife; and that interest made no part of the question, which was general, *that in no case husbands or wives could be witnesses for or against each other.*

3. "So in questions tending to criminate the husband, the wife is an inadmissible witness; and *vice versa*."

Rex v. Cliviger.
2 Term Rep.
263.
Broughton v.
Harper.
2 Ld. Raym. 752.
S. P.

Therefore where the question was concerning the settlement of a pauper, which settlement was claimed as being the wife of *James Whitehead*; the marriage was proved, but it was insisted on the other side that *J. W.* had a former wife (*Ellen*) living: he denied that he ever was married to *Ellen*; upon which it was proposed to call her: but she was held clearly not to be a competent witness, for her evidence went to criminate her husband, by proving him guilty of bigamy; she therefore was rejected.

Mrs. Rudd's
case. Leach,
Crown Caf. 134.

But where on an indictment a woman was called as a witness, she was asked if she did not expect that the conviction of the prisoner would not contribute to procure her husband's pardon, who was then under a capital conviction? she said, *she hoped it might*: this it was held went to her credit, not to her competence. This witness was Mrs. *Perreau*, whose husband had been convicted on the evidence of Mrs. *Rudd*.

But this rule admits of some exceptions.

Raym. 1.
Contra Brownl.
47 and 2 Hawk.
P. C. 432.

As, 1. In cases of high treason, the wife may be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other.

Ex parte James.
1 P. Wm. 611.
Field v. Curtis.
Cowp. 829.
* [721]

2. By stat. 5 G. 2. c. 30. the wife of a bankrupt may be examined as a witness touching his estate; but not as to any thing further respecting his bankruptcy: nor as to the act of bankruptcy where or how committed.

Bull. N. P. 287.

3. On an indictment on 1 Jac. 11. for marrying a second wife, the first being living, the first wife cannot be a witness, the second may; for the second marriage is void.

4. *A woman taken away by force and married*, may be a witness against the husband, under stat. 3 H. 7. c. 2. against the stealing of women; for a contract obtained by force has no obligation in law. Fullwood's case. Cro. Car. 488.

5. In cases of *personal torts* by the husband against the wife, she may be admitted as a witness against him; and *vice versa*.

In Lord *Audley's* case, the wife was allowed to give evidence against the husband, to prove his assisting in a rape on her. Lord Audley's case. Hutt. 116.

So in an indictment against the husband for an assault on his wife, Lord *Raymond* admitted the wife to be a witness against him on the authority of the last case. Rex v. Azire. 1 Stra. 633.

So the wife is always permitted to swear the peace against her husband: and her affidavit has been permitted to be read on an application to the Court of *King's Bench*, for an information against the husband, for an attempt to take her away after articles of separation: and it would be strange to permit her to be a witness to ground a prosecution on, and afterwards not permit her to be a witness on the trial. 2 Hawk. P. C. 432. Lady Lawley's case. Bull. N. P. 287. Rex v. Mary Mead. 1 Burr. 542.

6. "In *actions between other parties*, the wife has been permitted to give evidence to discharge one of the parties, by *charging her husband*."

As in an action for wedding-clothes furnished to the wife, and brought against the husband, the defence was, That they were furnished on the credit of the wife's father; and to prove it, the wife's mother was called and allowed, though it went to charge *her* husband. Williams v. Johnson. 1 Stra. 504.

"So *her declarations* have been admitted as evidence to charge the husband."

As where it was for nursing the defendant's child, the Chief Justice allowed the declarations of the wife, that she had agreed to pay four shillings a week, as good evidence to charge the husband; such matters being usually transacted by women. Anon. 1 Stra. 537.

"But it seems doubtful if this last case is law, and if the exception should not be confined only to cases where the action is between other parties; for in fact to admit the declarations of the wife to third persons as evidence against the husband, is admitting her testimony against the husband; and so it has been held."

[722]

As where in trespass for taking dung: on the cross-examination of a witness, a question was asked tending to shew that the *plaintiff's wife* had acknowledged that the dung had been sold by the plaintiff to the defendant; this question was objected Kerlake v. Shepherd. Exeter Lent Ass. 1780. MSS.

objected to, as it was making the wife evidence against her husband. Just. *Nares* was of that opinion, and rejected the evidence.

Hill v. Hill adm.
2 Stra. 1092.

So in an action for wages earned by the wife of the plaintiff from the defendant's intestate, the Chief Justice would not allow the wife's owning the receipt of 20l. to be given in evidence against the husband.

Alban & ux. &
al. v. Pritchett.
6 T. Rep. 680.

Again, where the husband sued *in right of the wife as executor* jointly with her; it was held, That her declarations were inadmissible.

Co. Lit. 6. 4.

4. " But no other relation shall exclude persons from being witnesses, though their situation may go somewhat to their credit."

Hill v. Wood.
Lent Ass.
Maidstone,
1789. MSS.

1. In an action of assault, a woman was called to prove the case: the counsel for the defendant asked her on her *voire dire*, if she was not wife to the plaintiff? she answered, No; she was then asked, if she did not live with him as his wife? This question was objected to, as it could go only to her credit, not to her competence; and therefore could not be asked on a *voire dire*; and it was said, 'That Lord *Kenyon* had so ruled it at the last sittings: Justice *Gould* was of that opinion, and that she might have refused to answer it; whereupon she was examined in chief: but another witness being afterwards called, the Judge ruled, That he might be asked if the former witness and the plaintiff did not live as man and wife?

2. In the case of parents and children it is the same.

Commins v.
Mayor and Bur-
gessees of Oak-
hampton.
Sayer, Rep. 45.
1 Will. 332.
S. C.

As where in an action for refusing to admit the plaintiff to the freedom of the corporation; at the trial the question was, Whether there was a certain custom in the borough to entitle the eldest sons of freemen to their freedom? under this the plaintiff claimed to be admitted, the corporation insisting that it was only by servitude; and whether the plaintiff's father, who had obtained his freedom by servitude, was an inadmissible witness to prove the custom? Per Ch. Just. *Lee*—Mere relationship, how near soever, does not go to the competency of a witness, unless there be a vested interest in the matter in question; though it may go to the credit of the witness. In the present case, the father had no interest in the matter in question, nor could he at any future time become interested, the freedom of the corporation not being transmissible; it rather made his franchise less valuable, by opening it to others, who might claim as the son did.

[723]

How far a father and mother may be admitted to prove the legitimacy of their children, it is settled,

That the declarations of a father or mother shall never be admitted to *bastardize the issue born after marriage*; but they may be witnesses to *prove when the issue was born*, and to shew whether it was born before or after marriage: so neither shall they be permitted to prove want of access or no connection; for such would be indecent, immoral, and impolitic.

Per Lord Mansfield.
Cowp. 592.

“ But they may be in all cases witnesses to prove the legitimacy of their children.”

As in *Pendrel v. Pendrel*, coram *Raymond*, which was an issue out of Chancery, to try whether the plaintiff was heir to *T. O.*; the marriage and birth being admitted by the order, the mother was admitted to prove that the father had access to her.

Bull. N. P. 287.
Vid. ante chap. of Ejectment.

So in *Lomax v. Lomax*, the mother was admitted to prove the marriage: and in an ejectment against *Sarah Brodie*, at *Hereford*, 1744, Justice *Wright* admitted the father to prove the daughter legitimate, her title being as heir to her mother.

Ibid.

3. Of Persons inadmissible as Witnesses, on account of Crimes, or being stigmatized by Law.

These are, 1st, On account of conviction for certain crimes to which the law has annexed the punishment of infamy: 2d, On account of religious tenets or principles which destroys their credit in a court of justice.

1. Of Persons infamous, on account of Conviction by Law for Crimes.

1. The crimes of this description are treason, felony, and what is denominated *crimen falsi*; as perjury, forgery, or the like: for where a man is convicted of these glaring crimes, his oath is of no weight.

Co. Litt. 6.

So if attainted of a false verdict, or of a conspiracy.

Ibid.

But outlawry is no disqualification of a witness, for such is punished by loss of property only, not of reputation; and so does not affect their credit as witnesses.

Co. Litt. 6.

* On a rule for an attachment *nisi*, granted on the affidavit of the defendant, the other party shewed for cause, that the defendant had been *convicted of forgery*, and stood in the pillory, and produced the record, and an affidavit of the identity of his person. *Per Cur.*—The rule must be discharged; for we cannot suffer the affidavit to be read. So in another case,

Walker v. Kearney.
2 Stra. 1148.
* [724]

case, the affidavit of one convicted of forgery to hold a defendant to bail, was refused to be read.

Priddle's case.
Leach, Cr. Cas.
382.

So a person convicted of a *conspiracy*, is an inadmissible witness.

Bull. N. P. 292.

Co. Litt. 6. 6.

2. The common punishment that marks the *crimen falsi*, is being set in the pillory; and therefore anciently they held, that *no man who had been set in the pillory could legally be a witness*; but the rigour of this rule is now abated, and it is now held,

Rex v. Ford.
Salk. 690.

That it is the *conviction of the crime*, not the nature of the punishment, which makes the party infamous; and therefore where the witness had been convicted of *barratry* and *fined*, but not sentenced to stand in the pillory, that he was incapacitated from being a witness on account of *the infamy of the crime*.

Mackinder's
case.

H. 27 Geo. 2.

C. B.

Bull. N. P. 292.

3. So the magnitude of the crime makes no difference; for a person convicted of petty larceny is equally infamous, and as such as inadmissible a witness as one convicted of grand larceny; for both are felony: but it is now enacted, by stat. 31 G. 3. c. 36. "That a conviction for "petty larceny shall not incapacitate a man from being a "witness."

Rex v. Crosby.
2 Salk. 689.

4. But if a person be convicted, and have an infamous judgment; as to stand in the pillory, *ex gr.* it is not necessary that *he should have actually stood there*; for it is the judgment to stand there that renders him infamous, not suffering the punishment.

5. "But a *general pardon* restores the competence of a "witness of this description, under the following distinctions:"

Salk. 689.

That where *the disability of being a witness is part of the judgment itself*, there the King's pardon shall not remove it (as in the case of perjury on the statute); for by the statute, it is part of the punishment that the person be infamous, and lose the credit of testimony; therefore if a person be convicted under the statute, the king's pardon cannot restore him: but where *the disability is a consequence of the judgment*, in such case the king's pardon shall restore the person to his competence of being a witness: as if the indictment is for perjury at common law, in such case the king's pardon shall restore the party, for the *infamy is the consequence, not a part of the punishment*.

Rex v. Ford.
2 Salk. 691.
3 Ref.

[725]

2 Salk. 689.

Bull. N. P. 292.

But a pardon by act of parliament will restore in all cases; and a burning in the hand amounts to a statute-pardon.

6. And as to how these objections are to be used at trials, it is settled, That where a witness has been pardoned, and afterwards is called as a witness, and objected to on ground of his having been convicted, he must produce his pardon *under the great seal*; for letters *under the king's sign manual* are not sufficient, being rather evidence of the king's intention to pardon, than a pardon itself.

Gully's case.
Leach, Cro. Cal.
101.

So the party who would avail himself of the incompetency of the witness, on account of a conviction, ought to have a copy of the conviction ready to produce in court.

2 Salk. 461.

7. "But it seems that the affidavit of a person so convicted, may be read in the case of the person himself where he is a party."

For where the defendant had been convicted of perjury, and in a subsequent case of a judgment against him, it was moved to set it aside on his affidavit, and it was opposed on the ground that he was convicted of perjury: but *per Holt*—Must he therefore suffer all injustice, and have no way to help himself? and he allowed the affidavit to be read accordingly.

Davis & Carter's
case.
2 Salk. 461.

But it can only be read *in defence* of a charge, not in *support* of a complaint.

Charleworth's
case, quoted in
Walker v.
Kearney.
2 Stra. 1143.

8. As to how far *particeps criminis* is a good witness, it is settled,

That a *particeps criminis* is a good witness in many cases: as for the plaintiff in trespass, though he is left out on purpose to make him a witness; and a recovery against the defendants in the action is a good bar as to him.

Bull. N. P. 286.
Per Denison.
Just. Sayer's
Rep. 290.

Therefore in an information for bribery at an election, brought on stat. 2 G. 2.; the person bribed, and who had taken the bribery oath, was called as a witness: he was objected to as a *particeps criminis*, and on the ground that the tendency of his evidence was to discharge himself, as the statute exempts from the penalty any person discovering another guilty of the offence: but it was held, That a *particeps criminis* was in many cases a good witness, even to obtain a reward or pardon for himself; and besides, that unless a *particeps criminis* was admitted as a witness, the statute would be of no avail, as such transactions are generally matters of secrecy: and Just. Denison cited a case, wherein Ch. J. Eyre admitted such a witness.

Bush v. Ralling.
Sayer's Rep.
289. quoted per
Ld. Mansfield.
Cowp. 199.

[726]

So where a clerk had embezzled money and notes of his master, which he had laid out with the defendant in illegal insurances in the lottery: on an action brought by the master, he was allowed, on receiving a release, to be a good witness,

Clerk v. Shree &
al. Cowp. 197.

witness, to prove that the money and notes had been so disposed of by him.

2 Hawk. P. C.
434.

In *criminal prosecutions*, according to the opinion of some, a *particeps criminis* can only be a witness in two cases, viz. if he be actually pardoned, or if he has no promise of pardon: but others have holden, that such a promise will be no exception to his competency, but only to his credit; therefore in *Sayer's case*, the Court refused to let a witness be examined on a *voire dire*, whether he had such a promise or not.

2. Of Persons infamous on account of their Religious Tenets or Principles.

Persons of this description are rejected, on the ground, that as it is necessary to have resource to the sanction of an oath, persons denying the being or attributes of the Deity, must consider themselves as not bound by the obligation of an oath, and therefore are not credible.

Bull. N. P. 202.

1. Such is the case of infidels or disbelievers, who are inadmissible as witnesses.

White's case.
Leach, Cr. Caf.
368.

Therefore where on an indictment for horse-stealing, a witness was produced, and being examined, he said, That he had heard that there was a God; and believed that those persons who told lies would come to the gallows: but he acknowledged that he had never learned the Catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after their death: the Court rejected him as incompetent.

2. But it is not necessary that a person should profess the *Christian Religion*: Jews are daily admitted, so are persons of other religions; it is sufficient if they profess a religion and belief in the Deity, which will be a tie on them to attest the truth.

Cowp. 390.

Therefore persons of different religions are to be sworn according to the ceremonies of the religion they profess: *Jews* are sworn on the Old Testament.

Rex v. Gilham.
Esp. Caf. N. P.
285.

Where a witness was sworn on the New Testament, who admitted that he was born a Jew, but the tenets of which religion he had never formally abjured, and was never baptized or admitted into the Christian church; yet, on his asserting, that he considered himself as a member of the established religion and bound by its precepts, Lord *Kenyon* held him

him to be an admissible witness, though he had taken the oath in manner mentioned.

So on a complaint made by *Jacob Fachina* against General *Sabine*, as governor of *Gibraltar*, *Alderaman Ben Monso*, a *Moor*, was produced as a witness, and sworn upon the *Koran*, without any objection.

2 Stra. 1004.
At the Council,
present the two
Ch. Justices.

[727]

So in this case a *Gentoo* was sworn as a witness according to the ceremonies of his religion, and admitted.

Omichund v.
Parker.
1 Atk. 21.

3. *Persons excommunicated* cannot be witnesses; for being excluded from the church, they are supposed to be under the influence of no religion.

Bull. N. P. 292.
3 Black. Com.
101.

By stat. 3 Jac. 1. c. 5. it is declared, "That *Popish recusants convicted* shall stand to all intents and purposes disabled, as a person lawfully excommunicated:" upon which it has been contested, that these shall also be excluded as witnesses: but Serjeant *Hawkins*, *P. C.* vol. 1. fol. 23, 24., contends, that is too severe a construction of the statute, which should only extend to a disability to bring actions.

4. Of Persons inadmissible as Witnesses, from Want of Discretion.

Of this class are persons *non compos*, idiots, madmen, and children whose age incapacitates them from discriminating between right and wrong.

Bull. N. P. 293.

With regard to children, there seems to be no time fixed wherein they are excluded from giving evidence: but it will depend in great measure on the sense and understanding of the child, as it shall appear on examination in court.

Ibid.

On an indictment for assaulting an infant of five years old, with an intent to commit a rape; it was held, That the child might be admitted as an evidence, if she appeared to have any notion of the obligation of an oath; and it was agreed by all the Judges, that a child of any age, capable of distinguishing between good and evil, might be examined upon oath; and that, therefore, evidence of what she had said ought to be received.

Brazier's case.
12 Apr. 1779.
Bull. N. P. 293.

But, however, this point seems formerly to have been otherwise ruled by very high authorities.

The defendant was indicted for a rape on a child of six years old, and Lord Chief Baron *Gilbert* refused to admit the child as an evidence: so he was acquitted. But at the same assizes he was indicted for an assault, with an intent to commit a rape: and it coming on to be tried at the next assizes, before Lord *Raymond*, the child was produced as a witness; and it was attempted to distinguish the case, that this

Rex v. Travers.
1 Stra. 700.
Kingston Lent
Ass. 1736.
Hale's P. C.
Not admissible
under 10 years
old.

[728]

this was a misdemeanor, and the other a felony: but the Chief Justice held, That there was no distinction between capital and lesser offences in this respect: for that children of so early an age were never admissible; and cited cases from the *Old Bailey*, where it had so been ruled.

2. HOW PAROL EVIDENCE IS TO BE GIVEN.

1. Every witness before he is examined must be *sworn*.

1. " But a witness may be examined as to his religious opinions; and if found to be an infidel or atheist, he may be rejected, that being a conclusive objection." (*Ante*, fol. 726.)

Anon. Sitt. after
Hil. 1791.

In a cause at *Westminster* before Lord *Kenyon*, a witness was produced: after being sworn, he was asked, " If he believed in the holy gospels of God?" After some prevarication, he answered that he believed in them as far as he understood them; he was admitted as a witness.

It was formerly the law, that in criminal cases the witnesses for the prisoner were not sworn; but it is now ordered by stat. 1 *Ann.* 9. That they shall be sworn in like manner as the witnesses for the crown; and perjury is in like manner assignable, if they swear falsely.

3 Inst. 79.

2. " In the case of Quakers a particular exception is allowed by stat. 7 & 8 *W.* 3. c. 34., which allows a Quaker's affirmation to be admitted in all cases where the oath is required from others, except in criminal cases."

Upon which statute it has been decided,

Castel v. Bam-
bridge & al.
2 Stra. 854.

In an appeal of murder a Quaker is not admissible as a witness; for it is a criminal proceeding, though the king is not the prosecutor.

Robins v. Say-
ward.
1 Stra. 441.

On a motion for an attachment for non-performance of an award, it having been moved on the affirmation of a Quaker, the Court held that they could not grant it, for though in a suit between party and party, it was a criminal proceeding within the stat. 7 & 8 *W.* 3.

Rex v. Wych.
2 Stra. 872.

On a motion for an information for a misdemeanor, the Court decided it, it being moved on a Quaker's affirmation.

Rex v. Green.
1 Stra. 527.

So a Quaker cannot exhibit articles of the peace without oath.

Oliver v. Law-
rence.
2 Stra. 946.

So a rule to answer the matters of an affidavit made on a Quaker's affirmation cannot be supported.

Rex v. Gardi-
ner.
2 Burr. 1117

On shewing cause against an information for a misdemeanor, a Quaker's affirmation was offered, the Court held, That

That a Quaker's affirmation could not be read *in support of a criminal charge*, though it might be read *in defence of a criminal charge in his own defence* where the person charged the Quaker; but that where it was in defence of another, where the Quaker is not himself charged, there it cannot be read.

[729]

So in an action of debt, on stat. 2 G. 2. c. 24. for bribery at an election, evidence on the affirmation of a Quaker is good and admissible; for it is not a criminal proceeding within the statute.

Atchison v.
Everett.
Cowp. 382.

So a rule to shew cause why an appointment of overseers should not be quashed, was made absolute on the affirmation of a Quaker; for it is not a criminal prosecution, though on the crown side, and entitled in the king's name.

Rex v. Turner.
2 Stra. 1219.

2. As to the *manner of swearing*—Persons of the established religion should swear in the usual form; but different sects are allowed to swear in the form usual with them; as *Jews* on the Old Testament, and with their hats on; so *Turks* on the *Koran*.

Ante, 35.

“ So sectaries in *England* have been admitted to swear according to their own rites.”

In the year 1657, Dr. Owen, Vice-Chancellor of *Oxford*, being called on as witness, refused to kiss the book; but desired that it might be opened before him; and he lifted up his right hand: The Jury prayed the opinion of the Court if they ought to pay the same credit to him as to a witness sworn in the usual manner; and Ch. J. Glynn told them he considered the oath as strong as that taken by any other witness.

Per Ld. Mansfield.
Cowp. 390.

2 Sid. 6.

There is a sect in *Scotland* who hold it to be idolatry to kiss the book at this day; but their form of swearing is much more solemn. At *Carlisle*, in the year 1745, on the prosecution of some of the rebels, there was no evidence but from persons of this sect, who would not kiss the book; a case was sent up to *London* for advice, if they should be received as witnesses? and it was agreed, That their evidence in that form was good.

Per Ld. Mansfield.
Cowp. 390.

3. As to what questions may be asked a witness.

It is a general rule, That a witness cannot be asked any question, the answering of which may oblige him to accuse himself of a crime, or subject him to penalties or punishment. Ante, *Hill v. Wood*, fol. 722.

2 Hawk. P. C.
433.
Farrell. 119.

But where an application was made to the Court to bail the defendant, who was charged with grand larceny; one of the bail was asked, *If he had ever stood in the pillory?* This

Rex v. Edwards.
4 T. Rep. 440.

VOL. II.

X

question

question was objected to, as tending to criminate him : but the Court over-ruled the objection, *as the answer could not subject him to any punishment.* He refused to answer the question, and was rejected.

East India Com-
pany v. Atkins.
1 Stra. 168.

* [730]

* But where a person going out in one of the company's ships bound himself by covenant to answer any bill of discovery filed against him, and not to plead the acts of parliament subjecting him to penalties and forfeitures in bar of the bill, it was decided, That to a bill filed he must answer in pursuance of the covenant, even though the discovery might subject him to penalties.

4. How far a witness shall be permitted to use memorandums to refresh his memory, it is settled,

“ That where a witness will swear to a fact from recollection, he may use a minute or memorandum to refresh his memory : But where he will only swear to a fact from finding it in a minute or memorandum, in such case he shall not be allowed to use such a memorandum ; but the original minute must be produced.”

Dee ex dim.
Church v.
Perkins.
3 T. Rep. 749.
Tanner v. Taylor.
Ante, 142. S.P.

In ejectment, for several premises at *Wendover* in *Buckinghamshire*, the question turned on the times when the several holdings expired : to prove these times a Mr. *Aldridge* was called as a witness : in giving his testimony he produced a minute, in which was written the times when the several tenancies commenced : being examined concerning it, he said, That some years before he had accompanied *Newton* the receiver of the estate round to the different tenants, and examined them as to their holdings, and minuted down in a book their several declarations as to the time when their holdings commenced ; that some of the entries were made in the book by *Aldridge* himself, and others by *Newton* ; that the minute from which he then gave his evidence was extracted from the book, but that the book itself was not in court. On his cross-examination he admitted, *That he had no memory of his own as to the specific facts, but that the evidence he was giving was founded altogether on the extracts he had made from the book :* it was held clearly, That the witness should not have been allowed to give his testimony under those circumstances ; and Lord *Kenyon* cited the following case :—

Mich. Vac.
1753. Lincoln's
Inn Hall.

Mr. *Noel* moved to suppress depositions on a certificate from the commissioners, that the witness, whose depositions they were, refreshed her memory during the examination, from minutes consisting of six sheets of paper, of her own hand-writing, the substance of which she declared she had set down as the facts occurred to her memory ; that five of the six sheets were in the form of a deposition, which she declared had been done for her by the attorney

torney for the plaintiff, whom she had requested to digest her notes, and reduce them to order, and that after that she transcribed them, and altered them where it was necessary to make them consistent with her meaning: that the six sheets then produced were entirely her own writing, unassisted by any one, and these she had frequent recourse to during her examination. The Lord Chancellor animadverted with some severity on the practice of so allowing the attorney to draw up the depositions a witness was to use, and suppressed the depositions.

[731]

In the last case the Chancellor said—In some cases a man may use papers at law; but I have known some judges (and I think I adhered chiefly to that rule myself) to let them use papers only drawn up as the facts happened.

But in this case Mr. *Le Roche* was permitted to refresh his memory by a copy from his own memorandum, which copy had been taken by another, but under his own directions.

Duchess of
Kingston's case.
11 St. Tr. 255.

5. As to how it is to be given to the jury—it must be done in open court.

For where the jury having withdrawn to consider of their verdict, one of the witnesses who had before been sworn for the defendant was called before them, and they re-examined him, and then they gave a verdict for the defendant: complaint being made of this to the judge of assize, he questioned them concerning it, which they owned, but that the evidence was the same in effect as that given before, *et non alia nec diversa*. This matter being returned on the *posse*, the Court were of opinion, That the verdict was not good, and ordered a *venire facias de novo*.

Metcalf v.
Dean.
Cro. Eliz. 189.

And note, That a witness after he has been examined in chief, and cross-examined, cannot regularly be objected to for incompetence.

Per Ld. Mans-
field.
4 Burr. 2252.

Vide contra, per Lord Kenyon, Stone v. Blackburn, Espin. Cas. N. P. 37.

But a witness excepted to by one party, and set aside, may be afterwards called by that party, and examined on his side.

Attwood v.
Dent.
1 Stra. 480.

2. OF WRITTEN EVIDENCE.

Written evidence is either public or private.

Public is, 1st, Records properly so called; that is, memorials of the legislature, and of the king's courts of justice, which are matters of the highest authority: 2d, Public matters not records: 3d, Private, as written documents belonging to individuals; as deeds, notes, &c., which derive their credit from the proof of their execution, by the party against whom they are produced.

I. OF RECORDS.

Records are of two sorts: 1. Acts of parliament: 2. Proceedings or records of courts of record.—In treating of which I shall consider,

1. The nature of each: 2. How they are to be given in evidence.

1. Of Acts of Parliament.

1. Acts of Parliament are either public or private; and they differ in the following respects:—

4 Co. 76.

Whatever concerns the kingdom in general is a general law; but whatever concerns only a particular class of men, or some individuals, is a particular law; the first is the object of general or public acts of parliament; the latter of private acts.

Bu L N. P. 223.

1. Therefore a law which concerns the *king* is a general law; for he is the head and union of the commonwealth.

Ibid.

2. So a law that concerns *all lords* is a general law, because it concerns all the property in the kingdom; it being all held under lords mediate or immediate.

Ibid.

But a law which concerns only *the nobility or lords spiritual*, is only a particular law, because it relates to one set of persons; as for example, a law making them liable to certain process.

Ibid.

But, perhaps, a law respecting the *whole body of the peerage* would be deemed a general law; for as such they are part of the legislature, and what relates to the constitution is a general law.

Ibid.

3. What relates to *all officers* in general is a general law, because it concerns the universal administration of justice, as *ex gr.* "That no sheriff or other officer shall take a reward "for executing his office;" but if it relates to *particular officers*, and not to the administration of justice, it is a particular law.

Ibid.

4. What relates to *all spiritual persons* is a general law, inasmuch as the religion of the kingdom is of general concern to the whole kingdom; as the several statutes of 21 Hen. 8. 13 Eliz. 10 and 3 Eliz. 11. concerning the leases of ecclesiastical persons: but the stat. 11 Eliz. of *Bishops' Leases*, is a particular law, as it respects only one set of spiritual persons.

Ibid.

* 5. An act that relates to and comprehends *all trades* is a general law, and because it relates to traffic in general; but an act respecting butchers or bakers only, is a particular law.

6. If

6. If the matter of a law be ever so special, if it *relates* Bull. N.P. 223.
equally to all, it is a general law; but a law *relating to some*
particular county or parish, is a particular law.

7. A private law may become a public one, by being re- Saxby v.
cognized in such public one; as the stat. 23 H. 6. c. 10. of Kirkus.
sheriffs' bonds, is a private law; but being recognized in stat. Sayer, Rep. 116.
4 & 5 Ann. c. 16., which enables sheriffs to assign it, it be-
comes a public one.

8. So a law may be both general and particular in differ- Bull. N.P. 224.
ent parts, as *ex gr.* 3 Jac. 1. *against recusants, in disabling*
them to present, which is general: but the clause giving their
presentations to the universities is a particular law.

2. Public and private acts again differ in the manner the
courts take notice of them.

1. A general act of parliament is taken notice of by the Bull. N.P. 222.
judges and jury, without being shewn to them: but a *parti-*
cular act is not taken notice of unless it is shewn: for the Court
cannot judge of particular laws which do not concern the
whole kingdom, unless that law be exhibited to the Court;
for they are obliged to judge *secundum leges & consuetudinem*
Anglie; and therefore a particular law not being *lex Anglie*,
as not relating to the whole kingdom, they are not *ex officio*
obliged to take notice of it, unless, like other matters, it is
brought before them.

2. But a *private act of parliament, or any other private re-* Hob. 272.
cord, may be brought before the jury and given in evidence if it
relates to the issues in question, *though it be not pleaded*: for Cro. Jac. 112.
the jury are to find the truth of the fact in question, ac-
cording to the evidence brought before them. And if
therefore the private act do evince the truth of the matter in
question, it is as proper evidence to the jury as any record or
other evidence whatever; perhaps the most proper sort of
evidence.

But, however, such is not in all cases admissible, for Bull. N.P. 224.
there are cases in which both public and private statutes
ought to be pleaded, and that is, *where they make void any legal*
solemnities: and the reason why they must be pleaded is
this; that as solemn contracts are not deemed nullities, but
voidable by the parties prejudiced, as quisquis renunciare potest jure
pro se introducto, perhaps the party might wish to waive the
benefit of the statute; but to construe them nullities would
be to lay the rule aside, and the party must receive benefit
from the law whether he would or not; and therefore it is
required that he shall plead such statute, to shew that the
party takes the benefit of it. [734]

Another reason for this is, that as it is matter of law Bull. N.P. 224.
what solemnities are necessary to a contract, it must, in 4 Co. 117.
like Hob. 72.

like manner, be matter of law how they are to be defeated. As therefore, where the action is founded on a contract, it must be shewn to the Court; so it must, in like manner, be shewn to the Court where it is to be defeated. Therefore the stat. of *Eliz.* touching usurious contracts, cannot be given in evidence, though a general law, but it ought to be pleaded. So a fine is declared to be void by the statute of *Westminster*, 2. 1. but is held only to be voidable; so a recovery by a wife with a second husband is declared to be void by statute 11 *H.* 8. but is construed only to be voidable. In all these cases, therefore, the statutes must be pleaded.

2 Inst. 336.
4 Co. 59.

Bull. N. P. 225.

So in an action or information on a penal statute, if there is another statute that exempts or discharges the defendant from the penalty, he must plead it, and cannot give it in evidence on the general issue; for the general issue is only a denial of the declaration, and the plaintiff has proved the defendant guilty when he has proved him within the law upon which his declaration is founded: but if the defendant would exempt himself from the charge, he should not have denied the declaration, but have shewn the law that discharges him.

Rex v. Pemberton.
1 Black. Rep. 230.

Tamen quare, If this be law? for on a motion to quash an indictment on a penal statute, 5 *Eliz.* for exercising the trade of a tanner, on the ground that there is another stat., 1 *Jac.* 1. c. 22., which exempts tanners from prosecution in several cases, it was objected, That the indictment should state the defendant was not within any of these exemptions; as in convictions in the game-laws all exemptions are to be expressly negatived: but the Court held, That *exceptions of this sort are to be taken advantage of in evidence, on not guilty*; and so refused to quash the indictment.

Rex v. Hall.
1 T. Rep. 322.

In this case it is said *per Cur.*—If a subsequent statute makes an exception to a former one, it is incumbent on the defendant to shew, by way of defence, that he comes within such exception.

3. Another case of giving statutes in evidence is, where there is a proviso.

Bull. N. P. 225.
Godb. 145.

* [735]

* If the *proviso* is matter of fact, it may be given in evidence under the general issue: as if an action of debt is brought against a spiritual person for taking a farm, and the defendant pleads *quod non habuit nec tenuit firmam contra formam statuti*, the defendant may give in evidence under that issue, that *it was for the maintenance of his house*, according to the proviso of the statute which allows it. But on an information under 5 *Ed.* 6. c. 14. for ingrossing, the defendant cannot, on the general issue, give in evidence a licence of three justices within a proviso of that statute; because, whether there

Rex v. Bryan.
2 Stra. 1101.

there was sufficient authority or no, is matter of law, and therefore must be pleaded.

But a saving proviso may be given in evidence on the general issue, because, if the party be within the proviso he is not guilty within the body of the act on which the action is founded.

Rex v Pen.
Jones, 320.
2 Roll. Abr. 68.
Godb. 144.

4. The title of a statute is no part of the law, nor shall its conciseness control the body of the act; for it does not pass with the same solemnity as the statute itself; one reading of it is often sufficient.

Per Ld. Mansfield
1 Black. Rep. 95.

2. OF PROCEEDINGS IN COURTS OF RECORD.

Proceedings in courts of record, which are the second species of public evidence, are, 1st, Fines and Recoveries: 2d, Verdicts: 3d, Judgments: 4th, Writs: 5th, Affidavits.

1. Of Fines and Recoveries.

These are matters of record, and conclusive evidence.

But, as a *præcipe* does not lie against a person that is not seized of the freehold, therefore when you shew a recovery you must prove *seisin* in the tenant in the *præcipe*: however, in an ancient recovery *seisin* will be presumed; especially where possession has gone agreeable to it since; for that fortifies the presumption that every thing was rightly transacted: but, in a modern recovery, the *seisin* must be proved; because, from the recency of the fact, it is easily done; and presumption in such case is not equally fortified by subsequent possession.

Green v.
Proude.
1 Mod. 117.
1 Vent. 257.
S. C.
Bull. N. P. 230.

But though in the cases of old recoveries, the Court will presume that there were proper tenants to the *præcipe* where no deed appears; yet, where deeds appeared inrolled for that purpose, wherein proper parties had not joined, and the uses were declared to be warranted by such deeds, the Court would not presume that there were any other. *Vid. Plen. ch. Ejectment, ante, fol. 487.*

Keen ex dim.
Earl of Portsmouth v. Earl of Effingham.
2 Stra. 1267.

2. Of Verdicts.

[736]

1. As to verdicts, it is a general rule, That no verdict shall be given in evidence, but between such as were parties in the cause in which the verdict was given, or privies to them.

Per Pratt, Just.
1 Stra. 68.
1 Raym. 730.

Therefore, a verdict on an indictment cannot be read on an action for the same cause; as an assault, *ex gr.*—for the one is at the suit of the king, the other at the suit of the party.

Per Pratt, Just.
1 Stra. 68.
1 Raym. 730.

However, in this case, which was an issue out of Chancery, *deviseavit vel non*, on which it was insisted, That the testator was *non compos* on the 29th, having shot himself the

Jones v. White.
1 Stra. 68.

31st; the Court were divided, Whether *the verdict of the coroner's inquest*, which found him a lunatic, was admissible evidence, or not.

Latkow v. Sheriff of Middlesex.
H. Black. 437.

So in this case, where goods had been taken in execution, and the plaintiff advanced the money to the officer, and paid off the execution, but did not then take an assignment or bill of sale of the goods; another execution afterwards came into the house, under which the same goods were taken; and being claimed by the plaintiff under the first transaction as a sale to him, the sheriff impannelled a jury, as *an inquisition* to try the right of property, and they found it to be in the plaintiff: notwithstanding which, the plaintiff in the second execution indemnified the sheriff, who levied on the second execution, and paid the money over to him, and the plaintiff brought trover against the sheriff:—It was adjudged, That *the inquisition so taken by the sheriff's jury* was not admissible evidence to prove property in the plaintiff, it not being under the king's writ.

“ However, the above rule seems to be correct, and the reason for it is, That it is the privilege of the party to cross-examine the witnesses; of which, by this means, he would be deprived.”

Sherwin v. Clarg s. 1700.
Bull. N. P. 232.

Therefore, a verdict on the *same point*, and between the *same parties*, may be given in evidence, though *the lands are not the same*: for in that case, the parties have had the liberty of cross-examination; and nothing can be more opposite to natural justice than that a man should be bound by a decision, which he had not an opportunity of opposing and controverting. But it can be no objection to the evidence *that the lands are different*: for the object of dispute makes no difference as to the right.

Bull. N. P. 232.

Therefore, in a trial between *A. lessee of B. and E.*, and *C. lessee of E. and B.*, in which the parties have only changed places from plaintiff to defendant, either party may give the former verdict in evidence, for there each party have had the benefit of cross-examination; and the Court will take notice, that in ejectment the lessor is the real plaintiff, and the lessee or nominal plaintiff, a fictitious person.

Lock v. Norborne.
3 Mod. 241.
Hard. 472.
Cal. K. B. 319.

Another reason why verdicts are only admitted in evidence between the same parties, is this: That as a stranger should not be prejudiced by a verdict in a cause to which he was not a party, he therefore shall not have any benefit from it; for no record, or conviction, or verdict, shall be given in evidence, but such whereof the benefit may be mutual, viz. Such whereof the defendant, as well as the plaintiff, might have made use, and given it in evidence in case it made for him: therefore a verdict on an indictment is not evidence in an action for the same cause; for as no person can be a witness

witness in his own cause in an action, though he may be on an indictment, to allow a conviction on an indictment to be evidence, would be to admit the parties own evidence; which should not be.

Gibson v. Mac-Carty.
Caf. temp.
Hardwick. 311.

“ But a verdict may be given in evidence in case of *pries*, under the following distinction :

If there be several remainders limited by the same deed, a verdict for one in remainder shall be given in evidence for another in remainder; but if there be a recovery against a tenant for life, this is no evidence against the reversioner: for the tenant for life is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid the reversioner or not; and the reversioner cannot possibly contest the matter where no aid is prayed: but, as if he comes in on the aid prayer, he may have an attain, consequently the verdict can be evidence against him.

Per Glyn.
Hard. 426.

Yelv. 32.

But where it is said that a verdict may be given in evidence between the same parties, it is to be understood with this restriction, *that it is of a matter which was in issue in the former cause*; for otherwise it will not be allowed in evidence, because if such verdict be false there is no redress, nor is the jury liable to an attain.

Bull. N. P. 232.

Hob. 53.

As where in a case for unskilfully varnishing certain prints, the property of the plaintiff, whereby they were spoiled, it appeared that an action had been brought by the present defendant against the present plaintiff, for work and labour in varnishing those prints, in which the present defendant had a verdict; and it was contended, that as the plaintiff might have defended himself in that action, by shewing that the prints had been spoiled, the verdict in that action must be held to be conclusive evidence in bar of this; but it was ruled by Lord *Kenyon*, that in order to make a record of a verdict evidence to conclude any matter, it should appear that that matter was in issue; which should appear from the record itself; nor should evidence be admitted that under such record any particular matter came in question, for that would be to try the cause over again.

Sintzenick v. Lucas.
Esp. N. P. Caf.
44.

But to the rule now laid down, are the following exceptions :

1. “ In the case of tolls and customs.”

For the custom or toll is the *lex loci*: and facts tending to prove that, may be given in evidence by any person, as well those who have been parties to such suit or to such verdicts as have found and determined them: and in such case it is not material whether such verdict be recent or antient.

City of London
v. Clerke.
Carth. 181.

2. “ Whether *parcel or not of a manor*, old inquisitions are “ admissible evidence.”

In

Tooker v. D. of
Beaufort.
1 Burr. 146.

In this case a commission under the great seal of the Exchequer, *Pasch. 33 Eliz. Rot. 290. in Scac.* directed to five commissioners, who were to inquire by the verdict of a jury, if the prior of St. Swithin of Winton was seised of lands, called *Woodcrofts*, as parcel of the manor of Hinton Daubeny; and whether King Hen. 8. Edw. 6. &c. were seised of it, &c. on which was a return by verdict, "That the prior was seised of it as parcel of that manor," &c. This was admitted as good, but not conclusive evidence of the facts contained in it; though the defendants in this cause were no parties to the inquisition.

[738]

Jones v. White.
1 Stra. 68.

So in this case it was agreed by the Court, that an *inquisitio post mortem* was good evidence.

"And it is evidence, though there has been a mis-trial of the inquisition."

Leighton v.
Leighton.
3 Str. 308.

For where on a trial at bar, the defendant made title under an old entail; and among other things offered in evidence an *inquisitio post mortem*, 25 H. 8. whereby it was found that the deceased tenant was seised in fee, and upon a traverse it went down into *Salop*, where it was found that the tenant was only seised in tail, on which judgment and an *amoveas manus* issued; it was objected that this was a mis-trial; for that the lands lay in *Wales*, and that the trial here was in *Shropshire*, it being before stat. 27 Hen. 8. c. 26. which united *England* to *Wales*, and so was *coram non judice*: But the Court ordered it to be read, saying it was not void, but voidable.

3. "A third case is that of commoners."

Per Buller Just.
1 T. Rep. 302.

If an issue has been tried in an action by a commoner, on a right of common, upon a custom extending over the whole manor, a verdict on that issue would be evidence in another action by another commoner, respecting the same right of common: *aliter*, where the common is claimed as belonging to a particular estate.

4. "In cases of pedigree principally, in which *hearsay* and *reputation* are evidence, there a verdict, though not between the same parties, is evidence."

Bull. N. P. 233.

As in such case a special verdict between other parties stating a pedigree, would be evidence to prove a descent; for in such case, what any of the family have been heard to say, general reputation in the family, entries in family-books, monumental inscriptions, recitals in deeds, are allowed.

Neal ex dim.
Duke of Athol
v. Wilding.
2 Str. 1151.
Bull. N. P. 233.

However, in this case, where a special verdict was offered in evidence of a pedigree, *Wright*, Just. was for admitting it, but the rest of the Court refused it: But it is said by Just. Buller, that Just. *Wright's* opinion is now generally taken as the law.

5. A verdict with the evidence, given in an action, brought by a carrier, for goods delivered to him to be carried, shall be given in evidence, in an action by the owner for the same goods, against the carrier: for it is strong proof that he had the plaintiff's goods; and if the witness is dead or not to be found, it is the best evidence; for it amounts to a confession in a court of record.

Per Holt. G.
Hall. 14 W. 3.
Bull. N.P. 243.

3. Of Judgments.

[739]

Judgments come nearly under the same rule as verdicts; for regularly, no judgment is admissible evidence, but against parties or privies.

But there are some exceptions:

As on an information, in nature of a *quo warranto*, against the defendant as bailiff of *Scarborough*; he made title as elected under the bailiffship of *Batty and Armstrong*; and upon issue joined, whether they were bailiffs or not? a record of judgment of *ouster* against them was read in evidence. On a motion for a new trial, it was held to have been properly admitted.

Rex v. Heydon.
2 Stra. 1109.

4. Of Writs.

Writs are to be given in evidence differently where they are only inducement, and where they are the gift of the action.

Where a writ is only inducement to the action, the taking out the writ may be proved without any copy of it; because, possibly, it might not be returned, and then it is no record: but where the writ is the gift of the action, there must be produced a copy from the record; for it does not become the gift of the action till it is returned; and it is necessary to have the best evidence the nature of the thing is capable of. *Vid. ante*, ch. *Trespass*.

Bull. N.P. 234.

5. Of Affidavits.

1. "Affidavits must be regularly intitled, in order to make them evidence."

Therefore, where affidavits were produced without any title of the cause, the Court would not allow them to be read; though the counsel on the other side were willing to waive the objection.

Per Ld. Kenyon.
2 T. Rep. 644.

So if they are mis-intituled, as in mistaking the Christian name of any of the parties.

Nix v. Jowatt.
Hil. 31 G. 3.
MSS.

But where the application is to make a *submission to an arbitration a rule of Court*, under the statute, where there has been no action, the affidavits upon which one of the parties applies for an attachment for non-performance of the award, need

Bevan v. Bevan.
3 T. Rep. 601.

need not be intitled in any cause; for there is then no action; but the affidavits in answer to the application must be intitled.

Rex v. Jones.

1 Stra. 704.

* [740]

* So on a rule for an information being moved, the affidavits were intitled in no cause; but the affidavits in shewing cause were intitled *Rex v. Jones*, and held to be right; for till the rule granted there was no cause in court.

Rex v. Harrison.

6 T. Rep. 60.

And even after a rule for an information had been granted, and the affidavits produced in shewing cause against that rule were not intitled in any cause; the Court held, that till the rule was made absolute, the affidavits need not be intitled.

Rex v. Lewis.

1 Stra. 704.

So in moving for a *certiorari* to an inferior court, the affidavits were intitled *Rex v. Lewis*; and objected that there was no such cause then in court; but the Court held it sufficient that there was such cause in the courts below.

Rex v. Sheriff of Middlesex.

3 T. Rep. 133.

Wood v. Webb.

3 T. Rep. 253.

Till an attachment issues, the proceedings must be on the civil side; after it issues, on the crown side: so that in moving for an attachment the motion and affidavits are to be intitled "*of the cause*;" after the attachment they are to be intitled "*the King v. the persons to be attached*."

2. Now by rule of court in *Easter Term 31 Geo. 3.* it is ordered, "That where any affidavit is taken by any commissioner from *any illiterate person*, the commissioner taking it shall certify or state in the *jurat* that the affidavit was read in his presence to the party making the same; and that such party seemed perfectly to understand it; and also wrote his or her signature in the presence of such commissioner."

And by a rule of the Court of *K. B.* made in *Michaelmas Term, 37 Geo. 3.* "Upon every affidavit sworn in that court, or before any Judge or Commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the *jurat*; and that no affidavit shall be read or made use of in any matter depending in that court, in the *jurat* of which there shall be any interlineation or erasure."

Rex v. James.

1 Show. 397.

3. "And affidavits made in the course of any cause used and filed are good evidence, and admissible at the trial of the cause without further proof; as if taken before a commissioner, that he was not a commissioner," *ex gr.*

Cameron v.

Lightfoot.

2 Black. Rep.

1191.

As in this case, which was trespass for false imprisonment of the plaintiff; an affidavit made by the defendant, shewing cause against a rule for discharging the plaintiff out of custody, was admitted without further proof,

S. C. supra.

1 Show. 397.

And proof of such a cause depending, and that such affidavit was sworn by the party, would perhaps be sufficient proof

proof even on an indictment for perjury ; but the copy of it would not.

4. Affidavits filed in one cause, may be read as evidence in another, and to affect persons, not parties to the cause ; as the attorney, officers, &c. Per Ld. Kenyon.
4 T. Rep. 290.

5. *Voluntary affidavits* are evidence against the party. *Vid. post.* under the head of *Answer in Chancery, how far Evidence.*

2. HOW MATTERS OF RECORD ARE TO BE GIVEN IN EVIDENCE.

1. As to the general rules of giving them in evidence:
2. How each in particular.

1. How Records in general are to be given in Evidence. [741]

1. "Records are evidences of the highest nature, and are conclusive evidence of the matter in question : no averment is permitted against them ; therefore, whenever a question or cause of action arises on a record, the party cannot deny or aver against the record, but only deny that there is such a record ; that is, by the plea of *nul tiel record.*" Co. Litt. 117.

"Whenever therefore this plea is pleaded, it shall only be tried by the record itself ; and every matter which can be tried by the record shall be so tried : nor can the party bring it *ad aliud examen.*"

As where in *assumpsit* the defendant pleaded in abatement, "That he was an attorney of the court, and so privileged ;" the defendant replied, that he was not an attorney, and concluded to the country. On demurrer it was held, That he should have concluded to the record, as the names of all attorneys of the court are kept on a roll, which was a record of the court, and by which it should have been tried, if the party was an attorney of the court or not. Forster v. Cale.
1 Stra. 78.

So if a man justify the having done a thing as a justice of peace, the question, whether a justice of peace or not ? must be proved by the record of the commission of the peace. 2 Roll. Abr. 574.
Pl. 9.

"But where the issue is on a matter of fact connected with a record, that shall be tried by a jury."

As if the question was, *whether the defendant did appear ?* that must be tried by the record ; because the appearance ought to be entered on record : but if the question be if the defendant did appear on a day certain, that shall be tried by a jury ; for it is not necessary to enter the day of the appearance on the record. Hoey. Marshall.
Cro. Eliz. 131.

If

Abbot of Strata
Marcella's case.
9 Co. 31.

If the question be, Whether *J. S. were sheriff of the county of Kent*? it shall be tried by the record: because every sheriff is appointed by letters patent, which are always recorded.

Bro. Trial.
pl. 113.

But if the question was, Whether *J. P. were under-sheriff to J. S.*? that shall be tried by a jury: for the appointment of an under-sheriff is never recorded.

2 Roll. Ab. 574.
pl. 7.

If the sheriff, after having returned *cepi corpus*, plead to an action of escape that the party never was in custody, the question, Whether the party ever was in the sheriff's custody? may be tried by the record of the return.

Ibid. pl. 8.
*[742]

* But if the sheriff had returned *non est inventus*, and an action been brought for the escape, whether the party were arrested or not, shall be tried by a jury.

Hynde's case.
4 Co. 71.

If the question be, Whether a deed be enrolled? it is to be tried by a record of the enrolment: but a question as to the time of the enrolment shall be tried by a jury; for such is not necessary to be enrolled.

Rex v. Knollys.
Ld. Raym. 14.

If the question be, Whether a person has a right to a peerage by writ? it shall be tried by a record of the writ: but whether a person have a right to a peerage by descent, it shall be tried by a jury: for it never can appear by the record that the person claiming the peerage was descended from him who was first created a peer.

10 Co. 92.

Ewel. N. P. 230.
Abbot of Strata
Marcella's case.
9 Co. 30.
Co. Litt. 117. b.
Bro. Ab. Trial,
pl. 40.

2. Records may also be given in evidence by exemplification or by a copy: and in what cases the record itself, or an exemplification, or when a copy is evidence, the distinction is this: where the record is the ground of the action it makes part of the pleadings, and appears in the allegations: in such case it is tried on the issue of *nul tiel record*; and it shall be tried by the record, as a record is evidence of itself.

Ibid.
Biggs v. Wharton.
Palm. 524.

But where the record is only inducement, in which case it is not traversable, (for nothing is traversable that does not make an end of the matter; and it cannot make an end of the matter if fact be joined with it,) in such case therefore the issue must be on the fact, and be tried by the jury; a copy of the record may be given in evidence to support the fact; for whenever a record is offered to a jury, a copy is evidence.

Co. Litt. 117. b.

So that the difference of the two cases is this: in the former the issue goes to the court; for *nul tiel record* is an issue in which the record itself is the only proof, and that the Court themselves inquire into: for no averment will be admitted against a record; but where the issue is on other matter and the record is only inducement, as the case of an escape, *ex gr.* the writ is inducement and the escape matter

matter of fact; in which case it is only necessary to shew that there was a writ, as being an averment in the declaration necessary to be proved; and so a copy is proof of that.

So where the action was debt on a bail-bond by the assignee of the sheriff, the plaintiff alleged a precept, called a bill of *Middlesex*, sued out against the defendant in the original action: the defendant alleged that no such precept issued: the plaintiff replied that there did, as appears by the records of the court, and prayed that they might be inspected. On demurrer the question was, If the conclusion was good? and per Cur.—The issuing of a writ from another court, as of an original from the Court of Chancery, is never a record of this court, until the return of it is filed; but the issuing of a writ from this court, although no return thereto is filed, is always a matter of record of this court, because there appears on the roll an award of the writ.

Whitmore v.
Rooke.
Sayer, 299. &
Cas. ibid. cit.

[743]

Whenever therefore the trial is by the record, that is, on the issue of *nul tiel record*, a day is given to bring in the record; if the record pleaded is a record of another and inferior court, the party pleading it must sue out a *certiorari* to the officer of that court who returns it; and he can only have it by *certiorari*, not by an order on the officer to produce it; but if the record pleaded be of a superior court, there the party pleading it must sue a *certiorari* out of Chancery; into which court when it is returned, it is sent by a *mittimus* from the Chancery into the court where it is pleaded.

Brok. Fail. Rec.
plac. 2.
Ibid. pl. 3.
Hewson v.
Brown.
2 Burr. 1014.
Ibid. plen.

If the record is of the court where it is pleaded, or of a superior court, if it be not brought in on the day given, it is a failure of record; but if it was a record of an inferior court, if it is not brought in on the day, it is not a failure of record; but the party must sue out an *alias* or a *pluries certiorari*; for in this case he is guilty of no neglect, as he is in the two former.

Ibid.

“ When the record is brought in it is good evidence, or otherwise under the following distinctions: ”

1. “ If the record be set out imperfectly or partially, it is sufficient if enough appears to prove the matter in dispute.”

Bro. Fail. Rec.
Pl. 4.

As if a man pleads a *recovery suffered of one acre*, and the record brought in is a *recovery of two acres*, this is good, and not a failure of record; as if two were recovered, one certainly is.

Ibid.

So if a man declares on a recognizance by *J. S.* and the record is of a recognizance of *J. S.* and *J. N.* jointly and severally, it is good; for *J. S.* is liable for the whole.

Ibid.

2. “ So

2. "So a variance in a part not material is not fatal."

Bro. Fail. Rec.
pl. 1.

As if there be pleaded a record of an *outlawry of the plaintiff, at the suit of J. S.* and on bringing in the record it is an *outlawry at the suit of J. N.* it is not a failure of record; for the material question is, Is there any outlawry against the plaintiff?

Coachman v.
Halley.
Hob. 179.

* So a variance *as to a continuance* is no failure of record; for the continuance is not a material part of the record.

* [744]

3. "But a variance in a material part is fatal."

Rastall v. Strat-
ton.
H. Black. Rep.
48.

As where the plaintiff declared in debt on a *judgment of Trinity Term 1787*, and on *nul tiel record* pleaded, the record was brought into court, and appeared to be the record of a *judgment of Easter Term 1788*; this was adjudged to be a failure of record.

S. C.

So where the declaration stated a judgment recovered, at the suit of *one*, and it appeared to be at the suit of *two* persons, it was adjudged to be a failure of record.

Rex v. Eden.
Esp. N. P. Caf.
98.

So where there was a variance between the judgment and *nisi prius* roll, it was held fatal: as where the indictment set out that "the cause came on to be tried before *Lloyd Lord Kenyon, C. J. &c. William Jones* being associated:" and that in the judgment roll it was "*Roger Kenyon* being associated." This was held a fatal variance.

Parry v. Paris.
Hob. 209.
Hard. 200.

But if a record of *one day of a term* be pleaded, and a *record of another day* be brought in, this is not a variance; for the whole term is but one day in the eye of the law.

Bro. Fail. Rec.
fol. 16.

Aliter, where the day is material.

Bro. Fail. Rec.
pl. 11.

So if a man pleads the outlawry of the plaintiff by the name of *J. S. Knight*, and the record brought in, be of *J. S. Gent.* this is a failure of record.

Dyer, 87.

So if the record of the outlawry brought in vary from that pleaded *in the day of the return of the exigent*, it is fatal; for the day is material.

And wherever there is a failure of record, the party pleading it has judgment against him.

Per Lord Mans-
field.
Doug. 6.

But it is to be observed, that the records which are of themselves conclusive evidence, are records of *the courts of record in England only*; for though an action lies on the judgment of a foreign court, the record of that court is not conclusive evidence, but the action is debt or assumpsit, and must go to the country.

Walker v.
Witter.
Doug. 1.

Therefore where the action was on a judgment of the courts in *Jamaica*, and the declaration concluded with a *prout patet*

patet per recordum, it was held to be wrong, and was rejected; and the plea of *nul tiel record* a mere nullity.

And this doctrine is general as to all courts in *England* not of record, as *ex gr.* the great sessions of *Wales*, which is not a court of record; so of the county-court, hundred-court, and court-baron. Walker v. Witter, ante Co. Litt. 117. b.

3. Another reason why copies of records should be good evidence, is, that being things of a public nature, to which every one has a right to have recourse, they cannot be transferred from place to place to serve a particular purpose; therefore copies, if properly authenticated, are good evidence; but a copy of a copy is not evidence; for the best evidence the nature of the thing will admit must always be given, and the further any thing is removed from the original truth, the weaker the evidence must be; besides there is a chasm in the proof, because it cannot appear that the first copy was a true one. Bull. N. P. 226.

[745]

These copies therefore are twofold: 1st, Under seal: and 2dly, Not under seal.

1st, Of Copies under Seal.

1. Copies under seal are called *exemplifications*, and are of better credit than any sworn copy; for the courts of justice, by putting their seal to them, attest their authenticity, as done under their authority, by persons more capable to examine, and more critical and exact than another person is or can be. Bull. N. P. 226. Tooker v. Duke of Beaufort. Sayer Rep. 297.

Exemplifications are twofold: under the broad seal, and under the seal of the Court.

1. Exemplifications under the broad or great seal, are of themselves records of the greatest validity, and to which the jury ought to give credit under the penalty of an attaint. Bull. N. P. 226. 10 C. 3. 93.

These records so exemplified under the great seal, are either records of the Courts of *Chancery*, or have issued from it, or are sent for into the Court of *Chancery* by *certiorari*, which is the centre of all the courts, and from thence the subject receives a copy under the attestation of the great seal. Ibid.

But upon exemplifications under the great seal, it is to be observed,

1. That nothing but *records* exemplified under the great seal, may be admitted in evidence; for being there preserved by the proper officer of the court, they are supposed to be free from all rature and corruption, and fair and unblotted, Bull. N. P. 227.

blotted, so that there can be no danger from the exemplification; but *deeds* exemplified under the broad seal cannot be given in evidence; for they being in the custody of the party, and not of the law, are subject to razures and interlineations, and therefore ought to be produced themselves, as the best evidence of the contract.

[746]

2. When the record is exemplified, *the whole ought to be exemplified*, for the construction must be on the whole taken together: however, this rule must be taken with some restriction. *Vid. post.* about giving sworn copies in evidence.

3. "In some cases an exemplification of a record is not complete evidence of all matters contained in it."

2 Roll. Ab. 678.
Bull. N. P. 226.

As if letters patent be given in evidence, in which it is recited "That a certain office was before granted to J. S. and that J. S. surrendered it to the King, who accepted the same, and granted it to J. D.;" this is not enough to avoid the title of J. S., *but the record of the surrender must be shewn*, or a true copy of it; for the recital of such surrender is not the best evidence that the nature of the thing will admit, and it would be of dangerous consequence, if by such sort of suggestion a man's title might be avoided; but if letters patent were given in evidence whereby, in consideration of the surrender of former letters patent, the King grants a particular estate to the party, this would be sufficient proof of the surrender; for the taking of an estate by the second letters patent, is itself a surrender of the first; the second letters patent are the best proof of the taking such estate, and then the surrender is by operation and construction of law.

2 Roll. Ab. 681.

Earl of Montague v. Ld. Prefeton.
2 Vent. 170.

So if the question turns on the surrender of a former grant, which is denied by the defendant, and to prove the former grant the takes advantage of the recital in the latter, (as in the case first put above,) he shall be bound by the recital of the surrender; for he must take the whole together; but if he only relies on the former patent which he produces, it will put the plaintiff on proving the surrender.

Cragg v. Norfolk.
2 Lev. 108.

So if letters patent recite a former grant to another, and grant of the office to commence from the determination thereof, the party claiming under the second must produce a copy of the first, that the Court may see that it is determined; for there can be no other proof of the determination of the grant than the grant itself, though perhaps in such case if the recital were that it was determined, the whole recital would be taken together.

2. The second sort of exemplifications are those under *the seal of the court* where the record is kept, and such are of higher credit than any sworn copy; but these can only be of records of that court, under whose seal they are exemplified. Bull. N.P. 227.

And the exemplifications of fines and recoveries under the *town-seal*, where the records were consumed, has been admitted in evidence. Whitehead case, cit. Hard. 120.

*So has the exemplification of a recovery in a court of ancient demesne being old, and the records lost.

Green v. Proude.
1 Mod. 117.

By stat. 27 Eliz. 9. the exemplification of a recovery in *Wales*, or a county palatine, is of the same validity as the original records.

*[747]
Olive v. Gwin.
Hard. 118.

2. Of Copies of Records not under Seal.

These copies are of two sorts: 1. Sworn copies: 2. Office-copies.

Of each of these, and how given in evidence.

1. Of Sworn Copies.

Sworn copies are the copies of records which the witness who produces them *swears he examined with the original*; as the copy of a judgment from *Ireland*, *ex gr.* or from one court in *Westminster-Hall* to another.

1. But the copies so admitted must be copies of records brought into court in parchment, and not of a judgment, *ex gr.* in paper signed by a master, though upon such judgment you may take out execution; for it does not become a permanent matter till it be delivered into court, and is there fixed as a roll of the court; for until it become so fixed, it is transferrable, as not being a roll of the court; of which only the law allows copies, as they ought not to be transferred from place to place. Bull. N.P. 228.

But a copy may be given in evidence *where the record is lost*, without swearing a true copy; for the record is in the custody of the law, and therefore if lost, there ought to be no injury to the parties right; and consequently the copy ought to be admitted without swearing to any examination of it, since there is nothing with which it can be compared; but in such case the instrument should be according to the rule required by the civil law *vetustate temporis aut judicaria cognitione roborata*. Green v. Proude.
1 Mod. 117.
Salk. 285.S.

As in ejectment for a rectory, to which a recusant had presented, the record of the conviction being proved to have

: Salk. 285

Y 2

been

been burnt, it was allowed to be proved by the estreats into the Exchequer.

Anon.
1 Vent. 257.

So the copy of a decree of tithe in *London* has often been given in evidence without proving it a true copy, because the original is lost.

Ibid.

So has a recovery of lands in ancient demesne, where the original is lost; but possession has gone according to the recovery.

[748]

2. As to how such a copy is to be given in evidence.

3 Inst. 173.

If a sworn copy is given in evidence, it must be a copy of the whole record; for the precedent or subsequent words may vary the sense and import of the thing produced.

Per Ld. Hard-
wicke. Canc.
Sir Hugh Smith-
son's case.
Bull. N. P. 228.

As in the case of inquisitions *post mortem*, and such private offices in which you cannot read the return without also reading the commission; but in cases of more general concern and notoriety, as the ministers return to the commission in *Henry the 8th's* time, to inquire into the value of livings, it would be of ill consequence to oblige the parties to take copies of the whole record, as the commission is a thing of such general notoriety that it requires no proof.

2. Of Office-Copies.

Bull. N. P. 229.

As to these a difference is to be observed between office-copies given out by a person intrusted by the Court for that purpose, and a copy given by an officer of the Court not intrusted for that purpose; the first are evidence of themselves without proof; the latter is not evidence without proving it actually examined; for every credit is to be given to a party appointed by law to a particular trust as far as it extends, but not to others who are not so intrusted.

Ibid.

Therefore the *chirograph* of a *fine* is evidence of such a fine, because the *chirographer* is appointed to give out copies of the agreement of the parties which are lodged of record.

Chettle v.
Pound.
P. Aff. 1700.
Bull. N. P. 229.

Allen's case.
13 Car. 1.
Clayton. 51.
S. C.

But where the *fine* is to be proved with proclamations, (as it must be to bar a stranger,) the indorsement of the proclamations by the *chirographer* on the back of the *chirograph*, is not evidence; for though the *chirographer* is authorized by the common law to make out copies of the fines to the parties, yet he is not appointed by the statutes to copy the proclamations; and therefore his indorsement is not evidence.

Bull. N. P. 229.
*Q. If this
should not be
further "on
being signed by
him, and not

Therefore it is not enough to give in evidence a copy of the judgment, though examined by the Clerk of the Treasury *, because it is no part of his office; for he is only intrusted

trusted to keep the records for the benefit of all men's perusal, not to make out copies of them.

proved to be examined," as in such case a sworn copy is evidence, but it must be proved.

Bull. N. P. 229.

So deeds enrolled by the proper officer are good evidence: aliter, where made out by another clerk not so intrusted.—*Vid. post.*

So of depositions. *Vid. post.*

[749]

So a rule of court produced under the hand of the proper officer is good evidence, without proving it a true copy; for it is an original.

2 Ld. Raym. 745.

And note; That when the copy is evidence, the Court will never order the original to be produced, unless there is a suggestion of a rasure or a new entry.

Per Pratt, C. J. 1 Stra. 307.

Therefore where the plaintiff moved that he might have a copy of the poll, and that Sir J. Ward, who had presided as mayor, might produce the original at the trial; the Court refused to make such an order, as there was no foundation for it, and the copy was evidence.

Brocas v. Mayor and Aldermen of London. 1 Stra. 307.

But where a rule was moved for on a justice of peace to produce an examination taken before him at a trial, it was granted, as it was necessary to prove the hand-writing of the party, in order to make it evidence.

Rex v. Smith. 1 Stra. 126.

2. HOW EACH MATTER OF RECORD MAY BE GIVEN IN EVIDENCE.

1. Of general acts of parliament, the printed statute-book is evidence; not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are evidence, because they are hints of what is supposed to be lodged in every man's mind already.

Bull. N. P. 225.

But of private acts of parliament, the printed statute-book is not evidence, though reduced into the same volume with the general statutes; but the party ought to have a copy compared with the parliament-roll; for they cannot be supposed to be lodged in the minds of the people.

Ibid.

However, a private act of parliament in print that concerns a whole county, as the act of Bedford Levels, for rebuilding Tiverton, &c. may be given in evidence, without comparing it with the record: and these things are rather admitted, because they gain some authority from being printed by the King's printer; and besides, from the notoriety

Per Holt, C. J. Cal. R. B. temp. Gul. 216. Goodridge v. Skinner. M. 7 C. 2. C. B. Bull. N. P. 226.

[750]

tority of the subject of them, they are supposed not to be wholly unknown : and for this reason printed copies of other things of as public a nature have been admitted in evidence, without being compared with the original.

Dupays v.
Shepherd.
Caf. K. B. 216.
S. C. as supra.

So the printed proclamation for a peace was admitted to be read, without being compared with the original record in Chancery, in order to prove the day of the peace being concluded.

Rex v. Jeffries.
1 Stra. 446.

In this case *Keble* and *Rastal's* statutes differed ; and they who were for adhering to *Keble* proved, *that they had examined him with the parliament-roll* ; the *Chief Justice* ruled this to be sufficient, and *Keble* was read.

2. As to fines, recoveries, judgments, writs, and affidavits, the law as to those, when the original and when a copy is evidence, has been already delivered.

3. As to *verdicts*, it has been decided,

Lee v. Brown.
Poph. 128.
Hard. 118.

1. That if a verdict is offered in evidence, it ought to be proved *by the record*, and not given in evidence by witnesses ; that is, by the record itself, or by an exemplification, according as the case is.

2 Roll. Ab. 680.
pl. 5.

But if the jury are agreed and discharged without giving a verdict, it is said that it shall be allowed to be given in evidence, that the jury were agreed, in the case of a common person.

Bull. N. P. 243.

So a nonsuit with proof of the evidence, upon which the plaintiff was nonsuited, may be given in evidence on another action brought by the same party.

Cotton v.
Walter.
1 Stra. 162.

2. The bare producing of the *possea* is no evidence of the verdict, without shewing a copy of the final judgment ; for it might have happened that the judgment was arrested, or a new trial granted.

Montgomery v.
Clarke, 1745.
Coram Dele-
gates.
Bull. N. P. 234.

But this rule does not hold where the verdict has been given *on an issue directed out of Chancery*, because in such case it is not usual to enter up any judgment ; and the decree in the Court of Chancery is equally proof that the verdict was satisfactory, and stands in force.

Per Pratt, C. J.
1 Stra. 162.

But the production of the *possea* is sufficient evidence that *there was a trial between the parties*, in order to introduce an account of what a witness swore at the trial.

Rex v. Iles.
Sitt. London.
Mich. 14 G. 2.
Coram Lord
Raymond.
Rex v. Minns,
Sitt. West. Tr.
32 G. 3. S. P.
ruled.

As on an indictment for perjury against a witness for what he swore at a trial, the *possea* is good evidence that there was a trial, so as to introduce the words spoken on which the perjury is assigned.

2. OF PUBLIC EVIDENCE, NOT RECORDS.

These come under the general definition, that they must be such as are evidence of themselves, and do not expect illustration from any other thing: such are court-rolls and proceedings in Chancery: of these too, copies may be given in evidence, inasmuch as there is a plain coherent proof; for there is proof on oath of a matter which, if produced, would carry its own light with it, and by consequence would need no proof.

These form the principal heads following: 1st, Proceedings in Chancery: 2. In the ecclesiastical and other inferior courts: 3. Other public matters in the nature of records.

I. OF THE PROCEEDINGS IN CHANCERY.

Proceedings in Chancery are not records, for the judgment is there *secundum equum & bonum*, and not *secundum leges Angliæ*; so that they are not the precedents of justice, as not being memorials of the laws of *England*, which bind the Chancellor in his determinations. Bull. N. P. 235.

Under this head, I shall consider, 1st, The bill: 2dly, The answer: 3dly, The depositions: and 4thly, The decree.

1. Of the Bill in Chancery, and how far it is Evidence.

1. The bill in Chancery is evidence against the complainant; for the allegations of every man's bill shall be supposed true, and as an admission of the fact; for it shall not be presumed that it was preferred by the counsel or solicitor without the parties privity, or that they mingled into it any facts which were not true; but in order to make it evidence, there must be proceedings on it; for if there were none, it should rather be supposed to be filed by a stranger to bar the party of his evidence.

1 Sid. 232.
It is said that
modern practice
is otherwise.
Buller N. P.
235. infra.

As if a patron sue the parson on a bond, and the parson prefer his bill in Chancery to be relieved, stating it to be a simoniacal contract; the bill and proceedings on it may be given in evidence on an ejectment to make void the parson's living.

Bull. N. P. ibid.

"But where the bill is a mere bill of discovery, it should seem that that would not be evidence."

Lord Ferrers v.
Shirley.
Fitzgibbon. 196.

Bull. N. P. 236.

Doe ex dim.
Bowerman v.
Sybourn.
7 T. Rep. 2.

Taylor v. Cole.
Sitt. Hil. 1789.
6 T. Rep. 3.
in not.

2 Vent. 70.
Eggleston v.
Speke.
3 Mod. 239.

Ford v. Grey.
Balk. 286.
3 Ref.

Earl of Bath v.
Bathurst.
5 Mod. 10.
3 Sio. 418.

Therefore, on an issue directed out of Chancery, to try the validity of a deed, where one *J. N.* was produced by the defendant to prove that he wrote it by the direction of Lord Ferrers in 1720, and to contradict his evidence, the plaintiffs produced a bill of Chancery, filed in 1719 by the defendant, which mentioned the deed; the Court would not suffer it to be read, though an answer had been put in; for it was no more than the surmises of counsel for the better discovery of the title: but in all cases where *the matter is stated by the bill as a fact*, on which the plaintiff sounds his prayer for relief, it will be admitted in evidence, and will amount to proof of a confession.

It was, however, in this case decided, That a bill in Chancery is no evidence of any facts in a cause, except to prove that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or the deposition of witnesses; the evidence offered was a bill filed by the defendant himself, praying relief; and held, That the facts stated in the bill, upon which the prayer for relief was founded, were not to be proved by production of the bill in Chancery.

In this case, however, Lord Kenyon admitted a bill in equity, filed by an ancestor, as evidence of a family pedigree stated therein.

Vide post. 755.

2. Of the Answer in Chancery, and how far it is Evidence.

1. If the bill be evidence against the complainant, much more is the answer against the defendant, because it is given in on oath.

But an *infant's answer by his guardian* shall never be admitted as evidence against him on a trial at law; for the law has that tenderness for the affairs of infants, that it will not suffer them to be prejudiced by the guardian's oath: so the *answer of a trustee* can in no cause be admitted as evidence against his *cestui que trust*.

So though an answer is evidence against the party himself, it is none against his alienee.

2. But in giving an answer in evidence, if it is read as the confession of a party, *it must be taken altogether, and not that part only be read which makes against the party whose answer it is*; for the answer is read as the sense of the party himself; and if you take it in this manner, you must take it entire and unbroken: therefore if, upon exceptions taken, a second answer has been put in, the defendant may insist to have that read to explain what he swore in the first answer.

“ But though the whole of an answer must be read
 “ when it is produced as evidence, yet it does not of course
 “ make that part evidence for the party who made it,
 “ which is in his own favour; for he shall be called on to
 “ prove the allegations which he so makes in many in-
 “ stances.”

As where a bill was filed by creditors against an executor to have an account of the testator's personal estate, the executor set forth by his answer, that he had received from the testator 1100l. which had been left in his hands; that on settling accounts with the testator, he gave the testator a bond for 1000l.; and that the 100l. remaining was given to him for his trouble in the testator's business, and there was no other evidence respecting this 100l.; it was insisted for the executor, That the answer must be taken together, and that it should be allowed to discharge him, since there was the same rule in equity as at law; but it was answered and resolved, That when an answer was put in issue, *whatever was confessed and admitted need not be proved; but that it behoved the defendant to make out by proofs whatever was insisted on by him by way of avoidance; but that was under this distinction, that where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, he ought to prove that matter of defence; for perhaps he admitted the fact out of apprehension that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth, whatever he says in avoidance: but if it had been one fact, (as if the defendant had said the testator had given him 100l.) it ought to have been allowed, unless disproved by the plaintiff, because nothing of the fact charged is admitted, and the plaintiff may disprove the fact if he can.*

Per Cowper, Ch.
 Hil. Vac. 1707.
 Bull. N. P. 237.

[753]

“ But where an answer is produced in evidence on a collateral matter, not as direct proof of the issue, it may be
 “ partially read in evidence.”

As where a witness was produced respecting the title to certain lands, and to prove him incompetent an answer in Chancery was produced, in which the witness swore, That he had an annuity out of the lands in question; Serjeant Maynard insisted upon having the whole answer read through; but the Court refused it, as it was only produced to prove the witness incompetent, not to prove the issue.

Sparrin v. Drax.
 M. 27 Car. 2.
 C. B. at bar.
 Bull. N. P. 238.

3. “ So an answer is no evidence for the party in a court
 “ of law, unless so ordered by the Court of Chancery in the case
 “ of an issue directed out of it, or unless the other party have
 “ made it evidence by producing it first.”

Bull. N. P. 238.

As where in an issue out of Chancery, to try the terms of an agreement which was witnessed by one witness: he
 being

Bourn v. Sir
 Thomas Whit-
 more, at Salop,
 1747.
 Bull. N. P. 238.

being dead before the trial, the plaintiff was under the necessity of producing a bill and answer in the cause, in order to make the witness's depositions evidence; by that means he made the defendant's answer evidence; which was accordingly read for him.

Bull. N. P. 238.

4. *Voluntary affidavits* are of the same nature nearly as answers in Chancery, and may be given in evidence against the person who has made them; but there is this difference;

Ibid.

[754]

That an answer which is the defence to a charge in a court of justice, where the defence is an oath, shall be presumed to be sworn, as it is proved by shewing the bill and answer.

Smith v. Goodier.
3 Mod. 36.

But a voluntary affidavit which is no part of any cause depending in court (as an affidavit that there were no incumbrances, *ex gr.*) must be proved to be sworn; for proving it signed by the party, the proof goes no further than to support it as a letter or note; and as such it may be given in evidence without more proof.

Bull. N. P. 238.

Another difference is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot; and the reason is, that the answer is an allegation in a court of justice, and being a matter of public credit, the copy of it may be given in evidence; but a voluntary affidavit has no relation to a court of justice, is a private matter, and not of public credit; and the affidavit itself must therefore be produced as the best evidence; besides, it must be proved to be sworn, which it cannot without it be produced.

Chambers v. Robinson.
Tr. 12 G. 1.
Bull. N. P. 239.

Therefore where in an action for malicious prosecution, the plaintiff offered in evidence to increase the damages, an office-copy of an affidavit made by the defendant in Chancery of his being worth 2500l., Lord Raymond would not let it be read; and the plaintiff was obliged to send for the original into Chancery.

“ But in some cases a copy of an answer is not evidence; as in the case of an indictment for perjury on it, though in all civil cases it is.”

Bull. N. P. 239.

For on an indictment for perjury, though a copy may be offered to, and sufficient to warrant the grand jury to find the bill, yet on the trial the original must be produced, and positive proof given that the defendant was sworn to it.

Anon.
3 Mod. 116.

But proof that a person calling himself T. S. was sworn, and that he signed the answer, and proof by another witness of the hand-writing, would be sufficient.

Rex v. John Morris.
2 Burr. 1189.

So on an indictment for perjury, an objection was taken, “ That there was no proof offered of the identity of the per-”

"*Jon who swore it, nor even proof that any person at all swore it:*" Lord Mansfield ruled at the trial, That proof of the defendant's hand-writing, and that the hand-writing subscribed to the jurat was the master's, as being sworn before him, was proof sufficient that the defendant was the same person, and that he swore it.

And in the last case Lord Mansfield mentioned, That the reason of the order of the Court of Chancery, "That all defendants should sign their answers," was with a view to the more easy discovery of perjuries in answers: and as to the *swearing*, that it was sufficient proof of the actual swearing by the person charged, to produce *the jurat attested by the proper officer*, at least sufficient to put the defendant upon proving that he was perjured.

[755]

But *no return of commissioners* (or of a master in Chancery) of the parties swearing will be sufficient, without some proof of the identity of the person.

Bull. N. P. 239.

3. Of Depositions, and how far they are Evidence.

1. The course of proceedings at law being only by *viva voce* testimony, depositions are only admissible *where the witness who made them is dead*, or cannot be procured; for till then they are not the best evidence the nature of the thing is capable of.

Godb. 326.
Fry v. Wood.
1 Atk. 445.

"Therefore, in order to make depositions evidence at law, it is necessary to shew that the witness was dead, or could not be procured."

As where on the trial of an issue out of the Court of Exchequer, the depositions of a witness, taken fifty years before, were offered in evidence, *but without any evidence, offered that he was dead*, the party relying on the presumption from length of time, which would entitle a deed of that date to be read: but the Chief Baron refused to admit it, though he added, *That had proper search been made and inquiry after the witness*, he would have admitted the evidence after such a length of time.

Benson v. Olive.
2 Stra. 920.

2. Depositions may be read in evidence *where the witness has been sought for and cannot be found*; for then he is in the same circumstances as to the party who is to use him, as if he was dead.

Bull. N. P. 239.

3. Where it is proved that a witness was subpoenaed, and fell sick by the way, his depositions are evidence; for then it is then the best evidence that can be had, and answers what the law requires.

Ibid.

4. "Though a witness was uninterested when his depositions were made, if when called upon to give his evidence

" he

" he is interested, he can neither be heard, nor are his depositions admissible."

Baker v. Lord
Fairfax.
1 Stra. 101.

* [756]

* For where in an issue out of *Chancery*, one of the witnesses after his depositions taken became interested, and confessing it on a *voire dire*, was rejected; upon which it was moved to read his depositions as if he were dead; but the Court refused.

Tilley's case.
1 Salk. 286.

So where depositions had been taken *in perpetuam rei memoriam*, and the witness who made them afterwards became heir to the lands, and he was now a party to the suit in ejectment, it was held clearly, That these depositions were inadmissible evidence; for the intent of taking the deposition is only *to perpetuate the testimony of the witness in case of his death*.

Rushworth v.
Counts of
Pembroke.
Hard. 472.

5. A deposition cannot be given in evidence against any person who was not a party to the suit, as it is a matter of justice that the party should have the privilege of cross-examining him: therefore depositions in *Chancery* shall never be given in evidence on an indictment or information; for in these the king is a party, which he was not to the civil suit.

Ibid.

Neither can these depositions be read *for a stranger against a party to the suit*: for as they could not be given in evidence *against such stranger*, neither shall they be given in evidence *for him*.

Nor for a stranger to the suit against a purchaser under the party.

Stanley v. Eegg.
Hard. 22.

As in the case of a bill filed by several commoners, for their common which is decreed.

But to this rule there are some exceptions.

Bull. N. P. 239.

1. In the case of customs and tolls.

Bull. N. P. 240.

2. In all cases where *hearsay and reputation are evidence*, depositions in any cause are evidence: for what a witness who is dead has sworn in a court of justice, is of more credit than what another person swears he has heard him say.

Sparrin v. Drax.
Mic. 27. Caf. 2.
Bull. N. P. 240.
Per Ld. Kenyon.
4 T. Rep. 290.

3. So where a witness in a cause swears to any fact, what that witness has sworn in depositions in another cause shall be admitted to contradict him.

1 Chan. Caf. 73.
Sir Martyn
Nowell's case.
1 Keb. 146.

4. So in *Chancery* it is the usual practice to read depositions taken in one cause as evidence in another, saving all just exceptions—as that they are between other parties.

6. To

6. To make depositions evidence, they should regularly *be taken upon bill and answer*, which are proved to have been filed.

Howard v.
Tremain.
4 Mod. 146.

And it shall be sufficient proof that they were so, by the *fix clerks' book*, mentioning them in the enrolment of the decree, though then lost.

5 Mod. 231.

This is where the depositions are not of a very ancient date, for formerly they did not enrol the bill and answer, and therefore *ancient depositions may be given in evidence, without proof of the bill and answer*; so depositions taken by the command of Q. Eliz. upon petition, without bill or answer, were, on solemn hearing in Chancery, allowed to be read.

Hob. 112.
Bull. N. P. 240.

But though proof of the bill and answer is necessary, in order to make the depositions evidence, yet this is to be taken with some restriction.

"For if a bill is filed, if *the defendant stands out to a contempt*, depositions taken are evidence, for then it is the party's own fault that he did not cross-examine the witnesses: but depositions taken before answer put in, are not admitted to be read, unless the defendant appears to be in contempt; for if there does not appear to be a cause depending, the depositions are considered as mere voluntary affidavits."

Howard v.
Tremain.
4 Mod. 147.
Sir Th. Raym.
335.

Therefore where a bill was filed by the devisee, to perpetuate the testimony of witnesses; the defendant, the heir at law, stood in contempt and would not answer, and thereupon the plaintiff had a commission, and examined the witnesses to the matter of his bill *de bene esse*; the defendant joined in the commission, and cross-examined some of the witnesses; before, however, he put in his answer, some of the witnesses died. These depositions were held to be good evidence, as otherwise the devisee might lose the benefit of their testimony, as the heir would not answer the bill nor call the devise in question, till after the witnesses were dead.

Howard v.
Tremain.
1 Salk. 278.
1 Show. 363.
S. C.

But if the depositions of witnesses are taken *de bene esse*, before the coming in of the defendant's answer, *the defendant not being in contempt*, such depositions are not evidence, because the opposite party had not the benefit of cross-examination; and the rule of the common law is strict, that no evidence shall be admitted, but what is or might have been under the examination of both parties: but perhaps in Chancery, on a special motion, it might be ordered to be read.

— v. Brown
& alt.
Hard. 315.

"In all other cases it seems that proof must be given of the bill and answer; that is, proof that a cause was regularly

[758]

“ regularly before the Court of *Chancery*, upon which the depositions were taken.”

Backhouse v. Middleton.
1 Ch. Caf. 175
Smith v. Veale.
1 Ld. Raym. 735.
Per Holt.
2 Jones, 164.

For if a cause be dismissed for irregularity of the complaint, the depositions made in it can never be read, for there was no cause regularly before the Court but where the bill is dismissed, because the matter is not proper for equity to decree on; yet depositions on the facts in the cause may be read afterwards in a new cause between the parties.

4. Of the Decree, and how far it is Evidence.

2 Mod. 231.
Trowel v. Castle.
1 Keb. 21.

A decree in *Chancery* or the Exchequer may be given in evidence between the same parties, or any claiming under them; for their judgments must be of authority in those cases where the law gives them jurisdiction; and it would be absurd not to suffer what is done by virtue of that jurisdiction to be full proof.

Ibid.

So a decretal order in paper with proof of the bill and answer, or if they are recited in the order, is good evidence.

2. OF THE PROCEEDINGS IN THE ECCLESIASTICAL AND OTHER INFERIOR COURTS.

1st, How far they are evidence: 2d, How they are given in evidence.

Bull. N. P. 244.

1. “ With respect to these matters, it is in general to be observed, That wherever any court, ecclesiastical or civil, possesses a competent jurisdiction, the decree, sentence, or judgment of that court is conclusive evidence of that matter whenever it arises collaterally in question in any other court of justice in the kingdom.”

Clews v. Bathurst.
2 Stra. 960.

Therefore, where the action was for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery, the plaintiff proved the marriage by a parson and a woman; to encounter which the defendant produced a sentence of the Consistory Court of London, in a cause of jactitation of marriage, brought by the supposed wife against the plaintiff, wherein she was decreed free from all contract, and perpetual silence imposed on the plaintiff. This was ruled by Lord Hardwicke, Ch. Just. to be conclusive evidence; and the plaintiff was nonsuited.

Da Costa v. Villa Real.
2 Stra. 961

* [759]

* So where the action was on a contract of marriage, and the defendant pleaded *non assumpsit*: on the trial the defendant offered in evidence a sentence of the Spiritual Court in a cause of contract, against which the Judge had pronounced

pronounced sentence, and declared Mrs. *Villa Real* free from all contract. The judge ruled this to be conclusive evidence against the plaintiff, who was therefore nonsuited.

And it was afterwards ruled in this case, that the sentence was so conclusive, that the judge would not admit evidence of fraud or collusion in obtaining it.

Prudam v.
Phillips.
M. 11 G. 2.
Ibid. in margin.

So in an action of *trover* for goods, judgment of condemnation in the Court of Exchequer in an information would be conclusive.

Ekins v. Smith,
Sir Th. Raym.
336.

2. " But in order to make the sentence of such court conclusive evidence, *the question must have come directly before them*, and not collaterally; nor shall the sentence be allowed to prove another matter collaterally."

Therefore, if in an information against *A. B.* issue is taken on the fact, *whether on such a year T. S. was mayor?* and it is found that he was not; if another information is filed against *C. D.* and the same issue joined, the finding and judgment in the last case is not evidence in this.

Bull. N. P. 244.

So where in *trover* for goods, upon evidence, the plaintiff having proved his possession, and the taking of them by the defendant, the defendant shewed, That the goods belonged to one Jane Blackham, to whom he had administered: the plaintiff then proved, That some days previous to her death, she had been married to him; it was then insisted for the defendant, That the Spiritual Court had determined the right to be in the defendant, for they could not have granted administration to him but upon supposing that there was no marriage, and that this sentence being on a matter within their jurisdiction, was conclusive: but *per Holt*—Their sentence is conclusive where it has been directly decided; such cannot be contradicted by evidence; but it is otherwise *where a collateral matter is to be inferred from the sentence*; such may be examined on evidence.

Blackham's
case.
1 Salk. 290.

So where in dower the defendant pleaded *ne unques accouple in loyal matrimonie*; the plaintiff replied, That Sir William Wolfey had exhibited a libel in the Ecclesiastical Court, charging her with having committed adultery with John Robins, and praying for a divorce; that to that libel she pleaded, That she was the wife of Robins, and not of Sir W. Wolfey; that before the cause was heard Robins died; but that afterwards the cause was heard, and the Court decreed, That she had been lawfully married to Robins: this was on demurrer held to be a bad plea, for the sentence might be by collusion; it was a determination to bind the right of land, to which the defendants or their ancestors

Robins v.
Crutchley.
2 Will. 121.

[760]
S. P. Ducheſs
of Kingſton's
caſe, ruled on
an indictment
for polygamy.

Leach, Cr. Caf. 348. ancestors had not been parties; besides, the only mode of trying the validity of a marriage is by the bishop's certificate.

" In this case it is observable, that the point to be ascertained, was the marriage of the plaintiff with *John Robinson*; that that was not the direct question before the Spiritual Court, which was on the adultery; therefore, the question was only collaterally decided, and so could not be conclusive: but it is there said, That if it had come directly in question on the bishop's certificate, that would be conclusive."

Crofts v. Salter.
3 T. Rep. 639.

3. But the sentence of the Ecclesiastical Court, in order to be decisive, must be positive in ascertaining the right: for where in case for disturbing the plaintiff in a pew, it appeared, That upon a libel in the Consistorial Court, the Court had adjudged the right to be in the plaintiff; but that on an appeal to the arches, *that Court had reversed the former sentence*: it was held, That this was not conclusive evidence for the defendant.

Bull. N. P. 245.

Therefore in dower, if the defendant plead *ne unques couple*, &c., and the bishop certifies on this issue that the parties are married, and such certificate be inrolled, and judgment given for the demandant thereon: *in the like action against another tenant, the defendant will be concluded from pleading the like plea*; for the matter having been *ex directo* determined between the parties, so that it can never be again controverted by them, the record is conclusive evidence of such fact against all the world.

Saloucci v.
Johnson.
Ante, 145.

4. " And courts take the same notice of the adjudications of *foreign courts* in matters of which they have confidence, and hold the sentences of such courts conclusive evidence; nor will the courts here examine into the grounds of their decision, if the matter appears to be within their jurisdiction."

2 Show. 232.
Barzillay v.
Lewis.
Ante, 145. S. P.

As in an action on a policy of insurance, with a warranty that the ship was *Swedish*, a sentence of the French Court of Admiralty condemning the vessel as *English* property, was held to be conclusive evidence.

Burton v.
Fitzgerald.
2 Str. 1078.

5. " But in order to make the proceedings in the inferior courts conclusive evidence, such court should have complete jurisdiction of the whole matter which is the object of the cause."

[761]

" Therefore, if the suit is in the Ecclesiastical Court, if it is mixed with any matter of temporal cognizance, there the sentence is not conclusive evidence."

Therefore,

Therefore, if a man devise *lands*, the probate of the will in the Spiritual Court cannot be given in evidence; for all *the proceedings there as far as relate to land are coram non iudice*: for having no authority to authenticate any such devise, a copy of a will under their seals is no evidence of a true copy.

1 Roll. Ab. 678.
Bull. N. P. 245.

But the *probate of the will of personal estate* is good evidence, because they have the custody of all wills that concern personal estate, and they are the records of that court, and therefore a copy of them under the seal of the court must be good evidence; and this is still the more reasonable, because it is the use of the court to preserve the original will, and only give back to the party copies of it, under the seal of the court.

But to this are the following exceptions:—

1. “Where the party who wants to use the will of lands in evidence cannot procure it, in such case the ledger-book is evidence.”

As where in avowry for a rent-charge the avowant could not produce the will under which he claimed, *as it belonged to the devisee of the land*, who was the plaintiff in the action: in such case it was held admissible evidence, and sufficient to charge the plaintiff to produce the ordinary’s register of the will, and to prove former payments.

Anon.
Cas. K. B. Rep.
Gul. 246.

Sed quare, If according to modern practice the plaintiff should not have had notice to produce it?

2. “Where a will of lands is wanting to *prove a collateral matter*, as a descent, *ex. gr.* in such case the ledger-book of the ordinary is evidence.”

As if it was necessary to prove the relation of father and son, in such case the ledger-book would be evidence: for the ledger-book is not merely a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, in such case the rolls of the Spiritual Court, that has authority to inroll all wills, are sufficient proof of such testament.

Dike v. Polhill.
Ld. Raym. 744.

Pettit v. Pettit.
1701.
Bull. N. P. 246.

But a *copy of the ledger-book* is not evidence.

Bull. N. P. 246.

6. On this head it is further to be observed,

“That where any inferior or other court has *jurisdiction*, and their sentence, decree, or judgment is final, *such decree, sentence, or judgment shall be conclusive and final in any other court of concurrent jurisdiction.*”

[762]

Hutchinson's
case.
Temp. Car. 2.
quoted Show. 6.

Therefore, where the defendant, having killed a man in *Spain*, was there prosecuted, tried, and acquitted, and afterwards was indicted here, it was held, That he might plead that acquittal in *Spain* in bar; because the final determination of a court of competent jurisdiction, is conclusive to all courts of concurrent jurisdiction.

Bull. N. P. 245.

So, as before-mentioned, in cases of *dower*, upon which the bishop has once certified marriage, *that* shall in every other case be conclusive, because that is the proper jurisdiction by which it is tried.

"But this rule is confined to cases of concurrent jurisdiction only."

Boyle v. Boyle.
3 Mod. 164.

For though a conviction in a court of criminal jurisdiction is conclusive evidence of the fact in a court of civil jurisdiction, yet *an acquittal is no proof of the contrary*: as if the father was convicted on an indictment for having two wives; this would be conclusive evidence in ejectment, where the validity of the second marriage was disputed: but an acquittal would not prevent the party from giving evidence of the former marriage so as to bar the issue of the second, for an acquittal ascertains no fact as a conviction does; nor would a conviction be conclusive so as to bar the party in a writ of dower, or in an appeal where the legality of the marriage comes in question; however, it would be evidence before the bishop on the issue of *ne unques accouple*; for though the fact of the marriage be not conclusive evidence of the legality of it, yet it is *prima facie* a proof of it.

Lord Howard v.
Lady Inchiquin.
1700.
Bull. N. P. 285.

Thurston v.
Slatford.
Salk. 284.

7. *A record of the sessions* in which his admission was entered, is good evidence to prove that a public officer had not taken the oaths by which he forfeited his office.

2. As to how these Matters are to be given in Evidence.

1. We have observed before in what cases the original will must be produced, and in what cases the probate.

Morse v. Roach.
2 Stra. 961.

[763]

As it often happened that the will concerned both personal and real estate, in which case the Ecclesiastical Court had a right to the custody, on account of the personalty, before the year 1718 the method was to deliver out a will of lands, to be proved at trials *on security being given*; but after that the registers refusing to deliver it, but attending with it themselves, and making exorbitant charges for their attendance, the Court in this case ordered it to be delivered out on security. However, the present practice is for an officer of the Commons to attend with it.

2. The

2. The Ecclesiastical Court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore where a lessee pleads an assignment of a term from an administrator, such certificate is good evidence: so would the book of the Ecclesiastical Court, wherein was entered the order for granting administration: so would the copy of the probate of the will be evidence that S. S. was executor; but a copy of the will would not be evidence of it.

Hempton v. Crofs.
Ed. 8 Geo. 2.
K. B.
Bull. N. P. 246.
Garrett v. Lyfter.
1 Lev. 25.
Smartle v. Williams.
Cit. Hardw. C.
Bull. N. P. 246.

3. Though in a suit relating to the personal estate, the probate of the will under the seal of the Ecclesiastical Court is sufficient evidence, yet the adverse party may give in evidence that the probate is forged, because such evidence supposes that the Spiritual Court has given no such judgment, and so there is no reason that the Spiritual Court should be concluded by it; but it cannot be given in evidence that the will was forged, because the Ecclesiastical Court has decided, by granting the probate.

Noell v. Wells.
1 Sid. 359.
Raym. 405.

So the adverse party may prove that the testator left *bona notabilia*, against the probate by an inferior court; for in that case the inferior court had no jurisdiction, as the administration should be a prerogative one.

So if letters of administration are shewn under seal, you may give in evidence that they were revoked; for this is in affirmation of the proceedings in the Spiritual Court, and does not controvert the propriety of their decision.

So neither can it be given in evidence that the testator was *non compos*, for that the Spiritual Court have power to decide, and have decided by granting probate, and that is conclusive.

3. OF OTHER PUBLIC MATTERS IN THE NATURE OF RECORDS.

1. The rolls of a court-baron are evidence; for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the manor-court, which was anciently a court of justice, relating to all property within the manor.

Bull. N. P. 247.

* So where the question was respecting the mode of descent of certain copyhold lands, a customary was produced in evidence by the steward of the manor, as the customary of the manor: he had received it from his predecessor in 1748, who had received it from his; it was of great antiquity, and handed down along with the rolls of the manor, but it was not signed by any person to evidence its origin or authenticity: the Court held nevertheless, That under the circumstances under which it had so been transmitted, joined to its antiquity, it was good evidence.

Den ex dim.
Goodwin v. Spray.
1 T. Rep. 465:
*[764]

Roe ex dim.
Beebee v.
Parker.
5 T. Rep. 26.

And when an entry from the court rolls of a manor is given in evidence in order to ascertain the mode of descent of lands within the manor, such entry is good evidence, though no evidence is offered that it has ever been put in use, or that any person had taken lands by descent under it.

Snow v. Cutler
& alt.
1 Keb. 567.
Comb. 138.
Rex v. Jevins.
Comb. 337.
12 Mod. 24.

And a copy of a court-roll under the steward's hand, is good evidence to prove the copyholder's estate.

So an examined copy of the court-roll is good evidence, if sworn to be a true one.

Bull. N. P. 247.
Salk. 281.

2. The *register of christenings, marriages, and burials* is good evidence, or the copy of it: and it is said that proof *viva voce* of its contents, without a copy, has been held good evidence: but Just. *Buller* doubts it, as it certainly is not the best evidence that the nature of the thing is capable of.

Stead v. Heaton.
4 T. Rep. 669.

So where the question was, Whether by custom the chapelry of *Harworth* ought to contribute one-fifth of the money raised to support the parish church of *Bradford*, of which *Harworth* was a vill: to prove it on the part of *Bradford*, the parish book was produced in which was an entry made by their own churchwardens in 1679; it was in these words:—"Received of *Harworth*, who this year disputed our ancient custom, but when sued paid it, 8l. and 1l. for costs." At the head of the page was this entry:—"It is an ancient custom thus to proportion church-lay—*Harworth* one-fifth, *Bradford* a third of the remainder," &c. &c. It was objected, That these entries, being by the parish-officers of *Bradford*, could not be made evidence in support of their right against *Harworth*: but the Court held, on a motion for a new trial, (the evidence having been admitted,) That the receipt was clearly evidence of the receipt of money sufficient to charge the officers, and that referring to the entry in the same page respecting the custom, was good and admissible.

"And it seems that books of that public nature shall be conclusive evidence of the matters of which they are proper registers."

May v. May.
2 Stra. 1073.
Trial at bar before Page, Probyn, & Lee, Just.

For where on question concerning the plaintiff's legitimacy, he produced the general registry of the parish wherein he was registered, as the son of his father and mother, in the same way that lawful children are entered.—This registry, the clerk said, was made from a day-book, from which the entries were made in this register, once in every three months; and the entries were made in the day-book immediately after the christening, or next morning. To encounter this, he was asked by the defendant if any notice was taken of bastards? he said, their method was to add *B. B., base-born*. The defendant then offered the day-book from whence the other entry was posted, in which

which *B. B.* was inserted; and they insisted that this was the original entry. This was opposed: the opinion of the Court was taken; Just. *Page* was for admitting it, but the two other Judges were against it; saying, the other was the only register, and there could not be two registers in one parish; so it was rejected.

But the registers of the marriages formerly solemnized in the Fleet are not evidence of marriage.

Neither is the copy of a register of a marriage in a foreign chapel evidence.

3. *Corporation-books* are good evidence where they are publicly kept as such, and entries made by the proper officer; or if that officer be dead, or sick, or refuses to attend, entries made by other persons may be good; but these matters must appear: and when the book is produced, it must be established.

* But where in a case of *quo warranto*, a book was produced which appeared to be only minutes of some corporate acts ten years before, *all written by the prosecutor's clerk, who was no officer of the corporation*; this was opposed on the ground that it never was kept among or esteemed one of the corporation-books, in which the entries were all made by the town-clerk; and there being some suspicion respecting the book, the Judge, before he would admit it, required an account by whom it had been kept for the ten years? and whether any body had seen it before? which the prosecutor not being able to satisfy him in, the book was rejected.

So where the question was, Whether *A. B.* at the time he did a corporate act was an out-burgess or not? and to prove it, the defendant who had a rule to inspect, and take copies of all the books and records of the borough, produced a copy of a letter fifty years old, and found in one of the corporation chests, wherein *A. B.* was mentioned to be of another place: The Court refused to admit it to be read, for it was not a corporate act within the rule; so that a copy was not evidence; but the original should itself be produced.

4. If the question be, Whether a certain manor be ancient demesne or not? the trial shall be by *Doomsday-book*, which will be inspected in court.

In ejectment for the manor of *Artam*, the defendant pleaded ancient demesne, and when *Doomsday book* was brought into court, would have proved that it was antiently called *Nettam*, and that *Nettam* appeared by the book to be ancient demesne; but he was not permitted to give such evidence; for if the name was varied it ought to have been averred on the record.

Reed v. Passer.
Esp. Caf. N.P.
213.

Leader v. Barry.
Esp. Caf. N.P.
353.

Per Cur, 1 Stra.
93.

Rex v. Mother-
fell.
1 Stra. 93.
* [765]

Rex v. Gwin,
Mayor of
Christchurch.
1 Stra. 401.

Anon.
Hob. 188.

Gregory v.
Withers.
Hil. 28 Car. 2.
Bull. N. P. 248.

Bull. N. P. 248.

5. *There is in the Exchequer a particular survey of the king's ports, which ascertains their extent; this therefore is good evidence on a question respecting their limits, or whether a thing be done in or out of the ports.*

Salk. 281.

2 Jones, 224.

Bull. N. P. 248.

6. *The rolls, or ancient books of the herald's office, are evidence to prove a pedigree; but an extract of a pedigree taken out of their records shall not; for it is not the best evidence in the nature of the thing, and a copy of the records might be had.*

Pitton v. Wal-

ter.

1 Stra. 162.

So where the question was, Whether the lessor of the plaintiff was heir at law to him that last died seised? to prove the pedigree, the Chief Justice admitted a visitation in 1623, made by the heralds, entered in their books, and kept in their office, to be read in evidence; he also admitted a minute book of a former visitation, signed by the heads of the several families, which was found in Lord Oxford's library.

[766]

Downes v.
Moorman.
Bunb. 160.

So the copy of an old agreement where the original was in the Bodleian library, from whence the Oxford statutes prohibit it to go out, was held good evidence.

Ex dim. Whit-

comb v. —.

P. 6 Ann. C. B. 7

Bull. N. P. 249.

Robert Rhodes's

case.

Leach's Cr. Caf.

23.

7. *The register of the navy-office, with proof of the method there used to return all persons dead with the mark D. D. is good evidence of the death of any person.*

So on an indictment for forging a seaman's will, *the muster-book of the navy-office* is good evidence to prove the identity of the supposed testator.

Vicar of Kel-

lington v. Mas-

ter and Fellows

of Trinity Col-

lege Cambr. &

alt. 1 Will. 170.

8. *An ancient survey from the first fruits office of the possessions belonging to a nunnery, which survey was taken in the year 1563, upon the dissolution of the monasteries, tempore Hen. 8. respecting the endowment of a vicarage, though it did not appear by what authority that survey was taken, was held to be good and sufficient evidence.*

Palm. 38.

9. *The Pope's bull is evidence upon a special prescription to be discharged of tithes, as to prove that such lands belonging to such a monastery, were discharged at the time of the dissolution, for then they continue discharged by the act of parliament of Hen. 8.; but it is no evidence on a general prescription to be discharged, because there appears a commencement of such a custom, and a general prescription is that there was no time or memory of the thing to the contrary.*

Palm. 527.

So the Pope's licence without the King's, has been held good evidence of an impropriation, because anciently the Pope was holden as supreme head of the church, and therefore to have the disposition of all spiritual benefices, with the concurrence of the patron, without any regard to the King; and these

these ancient matters must be judged according to the error of the times in which they were transacted.

10. *An old terrier or survey of a manor, whether ecclesiastical or temporal, is good evidence ; for there is no way of ascertaining old tenures or boundaries.* Bull. N. P. 248.

But a *survey made by one party without the privity or concurrence of the other*, is not admissible evidence. Anon. 1 Stra. 95.

9. So where to prove a place the public road, a copper-plate map was produced, wherein the close in question was described as a public road, and purporting to have been taken by the direction of the churchwardens for the time, and evidence offered that it was generally received in the parish as authentic ; Lord *Kenyon* rejected the evidence, saying it would be equally improper as to receive in evidence a plan taken by the lord of a manor, who might thereby crush and destroy the estates of his tenants. Pollard v. Scott. Peake, N. P. Cal. 18.

So a *terrier of glebe* is not evidence for the parson, unless signed by the churchwardens as well as by the parson ; nor then if they are of his nomination : and though it be signed by them, it deserves very little credit ; unless it be also signed by the substantial inhabitants ; but in all cases it is strong evidence against the parson. Bull. N. P. 248.

* 11. *A general history* may be given in evidence to prove a matter relating to the kingdom in general, but not to prove a particular right or custom ; therefore in the case of *St. Catherine's Hospital, Ch. Justice Hale* allowed a chronicle to be evidence of a particular point of history in *Edw. 3d's* time : so a year-book is evidence of the practice of the court ; therefore *Carnden's Britannia* being produced to prove a right respecting the digging of salt-pits at *Nantwich*, it was rejected. Rex v. Burgess of Droitwich. Salk. 28. * [767]

So where the question was, If it was an inferior abbey ? *Dugdale's Monasticon* was refused, as the original records were in the Augmentation-office.

12. The certificate of the commissioners for stating the army-debts is conclusive evidence, nor can the party be admitted to impeach or disprove it by evidence. Moody v. Thurston. 1 Stra. 481.

But in such case the certificate must be made by them sitting as commissioners ; for where it had been signed by them at their own houses and apart, it was rejected. Mountcan v. Wilson. 1 Stra. 568.

13. *An inventory taken by the sheriff on an execution, is evidence between strangers, to prove the quantity and value of the goods ; for the law intrusting him with the execution must trust him throughout.* Baxter v. Seer & alt. 2 Keb. 377.

Aicle's case.
Leach Cro. Caf.
330.

14. In an indictment against a prisoner for returning from transportation before the term of it expired, it was necessary to prove the precise day on which the prisoner had been discharged from *Newgate*: to prove it the *daily book, kept by the clerk of the papers*, containing entries of the names of the prisoners when brought in and when discharged, was held to be good evidence; though it appeared that the entries were made partly from the information of the turnkeys, and partly from their indorsements on the writs, and not from the clerk of the papers own knowledge; for being things of a public nature, credit was to be given to them till it was impeached.

2 Roll. Ab. 670.
Litt. Rep. 167.

15. It is a general rule, that *depositions taken* in a court not of record, shall not be allowed in evidence elsewhere: so it has been holden in the case of depositions in the ecclesiastical court, though the witness is dead.

“ And the rule seems to be general, that except when
“ provided for by particular statutes, the depositions of
“ witnesses on oath are not evidence, unless the parties
“ to be affected by it have had the benefit of cross-examination, even though such witnesses could not be produced
“ in person.”

Rex v. Paine.
1 Salk. 281.

* [768]

* Therefore in an information for a libel against government, and not guilty pleaded, the *Attorney-General* offered in evidence *depositions taken before a justice of the peace*, relating to the fact, the *deponent being dead, &c.*—*Per Cur.* Upon advice with the justices of the Common Pleas, depositions taken before a justice of peace, if the deponent die, may be made evidence by stat. 1 & 2 P. & M. 13. but it extends only to the case of felony, not to this case.

“ This was the doctrine held by Lord *Kenyon* and *Just. Grose*, in the following case; *Justices Ashburst* and *Buller* dissent.”

Rex v. Eriswell.
3 T. Rep. 707.

A pauper then residing in the parish of *Icklingham*, where it was apprehended he was not settled, was taken up by the parish-officers of that parish, and brought before two justices for the purpose of being examined concerning his settlement; in consequence of which he was examined, and his examination signed by himself before the justices; but no removal then took place: he continued to reside in *Icklingham* for some years, when he became insane, and the question was, Whether the examination so taken was evidence or not? when the Court were equally divided on the question,

But to this rule are the following exceptions:

1. By

1. By statute 1 & 2 Ph. & M. 13 & 2. and Ph. & M. 10.
 " Justices of peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these examinations shall be read against the offender upon an indictment if the witnesses be dead."

So where an *accomplice* had made a full confession in writing, and given information upon oath against the prisoner, before Lord Ch. Just. Lee, pursuant to 1 & 2 Ph. & M. 2 & 3 Ph. & M. but before the prisoner was brought to trial the accomplice died: it was adjudged, That the depositions so taken were admissible evidence.

Westbeer's case.
 Leach.
 Cro. Car. 14.

Upon this principle, where a pregnant woman had made her examination before a justice of peace, charging a certain person to be the father of a bastard child, and died two hours after her delivery; it was decided, that the examination so taken was admissible evidence before the court of Quarter Sessions, in order to make an order of filiation on the party so charged, the examination having been taken in the course of a judicial proceeding, and was likened by the Court to proceedings under stat. 1 & 2 P. & M.

Rex v. Ravenshoe.
 5 T. Rep. 373.

By stat. 33 Geo. 3. c. 9. § 33. which was the mutiny act of that year, two justices are empowered to take the examination of a soldier as to his settlement, and then orders them to give an attested copy of such examination to the soldier to be by him delivered to his commanding officer, and makes such attested copy evidence when produced.

As this *ex parte* examination is made evidence by the statute, contrary to the established rules of evidence, the Courts will construe the statute strictly, and therefore refused to admit any other attested copy of such soldier's examination to be evidence, except that which is by the statute so ordered to be delivered to the soldier as aforesaid.

Rex v. Inhabitants of Clayton le Moors.
 5 T. Rep. 704.

3. By stat. 5 Geo. 2. c. 30. §. 41. " The *depositions before commissioners of bankrupt* are ordered to be recorded, and that copies of such record of the depositions shall and may be given in evidence to prove such commission, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters and things when the witness is dead."

And depositions so taken and recorded, are good and admissible evidence to prove the precise time when an act of bankruptcy was committed.

Janfon assig. of Burton v. Wilson.
 Doug. 244.

Bromwick's
case.

1 Lev. 180.

2 Jones 53.

4. If the *witnesses examined on the coroner's inquest be dead or beyond sea*, their depositions may be read, for the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction, and therefore the law will presume the depositions before him to be fairly and impartially taken.

Per Ld. Kenyon:

4 T. Rep. 290.

5. Analagous to depositions is the evidence before given by a witness: as to which it has been decided, that in courts of law, the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim; as was agreed on all hands at a trial at bar in Lord *Palmerston's* case; but in such case it is not sufficient to swear to the *effect of the words used* by the witness at the former trial, but the words themselves ought to be given.

Green v. Gate-
wick.

Mic. 24 Car. 2.

Bull. N. P. 243.

So where a witness was sworn in a trial at bar in *C. B.* between the same parties, and on the same issue; and on a second trial he was subpoenaed by the defendant to appear in *K. B.* and his charges given to him; but he not appearing, persons were admitted to swear what he swore in *C. B.*, for the Court said, That they would presume that he was kept away by the practice of the plaintiff; which supposition was strengthened by his having been produced by the plaintiff on the first trial.

2. OF PRIVATE WRITTEN EVIDENCE.

This is, 1st, Deeds: 2. Other inferior written evidence.

1. OF DEEDS.

1. As to what matters deeds are evidence: 2dly, How they are to be given in evidence to the jury.

1. As to what Matters Deeds are Evidence.

Bull. N. P. 249.

1. "Where any person claims by a deed in the pleadings, he must make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be produced."

Ibid.

For in every contract there must be apt words to shew what rights are transferred, and to whom; and the sense and signification of these words must be expounded by the law; there must therefore be a profert of all solemn contracts: 1. For the security of the subject, that what right is transferred may be adjudged of according to law: 2. Because all allegations in a court of justice must set forth the thing demanded; and the thing there demanded cannot be

set forth without shewing the instrument upon which the demand arises.

" But where a man shews a good title in himself under the deed, every thing collateral shall be intended, whether it be shewn or not; and that matter is collateral which does not enter into the essence or being of a title, but arises *aliunde*; so that there may be a derivation of title without it."

Bull. N. P. 249.

As where in trespass the defendant justified taking the beast in question as an heriot, as servant to *John Ardern*, who had been enfeoffed of the lands by *St. Leger*, and shewed the custom of so taking: it was demurred for cause, That the defendant entitled *John Ardern* as a purchaser by feoffment, and *shewed not the attornment of the tenant*; but it was over-ruled, for the Court said, That it should be intended.

Sir Humphry
Ferrers v. Wignall.
Cro. Eliz. 400.

Neither can *privies in estate* take any advantage of a deed without shewing it; as if there be tenant for life remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it without shewing the deed; for since the right passes merely by the deed, to say that a person is released without shewing the deed, would not be a good plea.

Co. Litt. 267.
10 Co. 92.

2. " But as to the cases in which a deed is necessary in evidence, a distinction is to be observed between things lying in grant, and things lying in livery; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed must be shewn."

Bull. N. P. 250.

As to things that lie in livery, a man may plead that *J. S.* enfeoffed him, without saying " by indenture," and yet give the indenture in evidence, because the feoffment is made by the livery, and the indenture is only evidence of such feoffment; but if a man plead that *I. S.* enfeoffed him by deed, it may reasonably be doubted whether he can give a parol feoffment in evidence, because he has bound himself up to a feoffment by deed.

2 Roll. Ab. 682.

Co. Litt. 281.

And though since the statute of frauds, the ceremony of livery only is not sufficient to pass an estate of freehold or term of years, but there must be a deed or note in writing, yet it is not necessary to set out such conveyance in the pleadings, for they are as they were formerly "*feoffavit & demisit*."

Bull. N. P. 251.

2. As in things that lie in grant.

[771]

These are incorporeal rights, as fairs, markets, advowsons, and rights to land where the owner is out of possession; and as they cannot visibly be delivered over, therefore they must pass by the next sort of conveyance that holds the second

Co. Litt. 225.

second place in point of solemnity ; that is, by grant under the hand and seal of the party.

Dr. Leyfield's
case.
30 Co. 92.

If a person claims any thing lying in grant, he must shew his deeds, or otherwise he must prescribe in the thing he pretends to, and the prescription being supposed immemorial, supplies the place of a grant.

30 Co. 93. a.

3. He that has a *particular estate by agreement of the parties*, must shew not only his own conveyance, but the deeds paramount ; for there can be no title made to a thing lying in agreement but by shewing such agreement up to the first original grant.

30 Co. 94.

But where a person claims any *particular estate by act of law*, he may make claim without shewing the deeds ; as tenant in dower, or by elegit, or guardian in chivalry, may claim an estate in a thing lying in grant, without shewing the deed ; for where the law creates an estate, and does not give the particular tenant the property of the deeds, it must allow the estate to be demanded without them.

Co. Litt. 225.

So he may plead a *condition without shewing the deed*, because he claims an estate by act of law, and therefore is not estopped by the act of livery ; and may claim an estate defeated by the condition without deed.

30 Co. 94.

But a *tenant by the courtesy*, though he is in by operation of law, cannot claim any estate lying in grant without the deed, because he has the property in and the custody of the deeds in right of his wife ; which property cannot be divested out of him during the continuance of his estate.

Ibid.
Bull. N. P. 252.

So also he cannot defeat an estate of freehold without shewing the deed, for the act of livery is an estoppel that runs with the land, and bars all people to claim it by virtue of any condition, without the condition appear in the deed ; and since he has the custody of the deed, he must shew it.

Ibid.

But where a man has not the custody of the deed, as where the mortgagee makes a lease, and after the mortgagor re-enters ; in which case the lessee has not the custody of the deed : in that case he is not compelled to shew it.

Co. Litt. 226.
Bull. N. P. 253.
* [772]

* 4. As no party shall take advantage of his own negligence in not keeping his deeds, which in all cases ought to be fairly produced to the Court, so his adversary shall not take any advantage of his violent detaining them ; for the one, by the violent taking away of the deeds, gives to the other a just excuse for not having them at command, and no man can take advantage of his own injury ; and therefore it

is a good plea for one party to say, "*That the other entered, and took away the chest in which the deeds were.*"

2. Of giving Deeds in Evidence to the Jury.

As to this, the general rule is, 1. That the deed itself must be given in evidence, and 2. That it must be proved by one witness at the least: for *delivery* being essential to a deed, it must be proved; and it is not sufficient only to prove the party's hand-writing subscribed.

Bull. N. P. 254.

The courts have adhered so strictly to this rule, that they will not suffer a party to acknowledge his deed in court.

Johnson v.
Mason.
Esp. N. P.
Cas. 89.

But it is not necessary that the subscribing witness should have actually seen the party sign the deed, it is sufficient if he acknowledged to the witness that he signed it.

Powell v.
Blackett.
Esp. N. P.
Cas. 97.

But there are some exceptions to this rule.

1. If after notice the opposite party refuse to produce it, *a copy will be good evidence*: but such copy ought to be proved by a witness who has compared it with the original, for otherwise there is no proof that it is a true copy.

1 Mod. 94.

2. For the same reason where a will remains in Chancery, by the order of the Court, a copy may be given in evidence, because the original is not in the power of the party.

1 Keb. 117.

3. So where it is proved that the deed itself is lost by fire, a copy may be given in evidence; but perhaps in such case, if it came out in evidence that there were two parts executed, and the loss of one only was proved, a copy would not be evidence: so if it were proved that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought not to be read, even though the defendant has sworn in an answer in Chancery that he had not got the original.

10 Co. 92.
Thurston v. De.
lahay, Hereford
Ass. 1744.
Bull. N. P. 254.
Pritchard v.
Symonds,
Hereford, 1744.
Bartlett v.
Gawler.
Tr. 14 G. 2.
K. B.
Bull. N. P. 254.
Style 205.

Where a party offers parol evidence of a written instrument, he must shew due diligence to get at the original. For where, to establish the settlement of a pauper, it was proved that he had been bound apprentice by indenture of two parts, one of which had been lost, but the other part had come to the hands of a Miss Taylor, inquiry had been made from her respecting it, and she had said, she could not find it, nor did she know where it was; but Miss Taylor was not subpoenaed as a witness: it was held, That parol evidence should not be admitted to prove the contents of the indenture.

Rex v. Castle-
ton.
6 T. Rep. 236.

And

And in these cases, if the party has no copy he may produce an abstract ; nay, give parol evidence of the contents : and where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, without being proved to be true, because in such case it may be impossible to give better evidence.

Ford v. Grey.
Salk. 285.
4 Ref.

[773]

A recital of a lease in a deed of release is good evidence of such lease against the releasor, and those that claim under him ; but as to others it is not, without proving there was such a deed, and that it was lost or destroyed.

2. As to the second part of the rule, that *the deed must be proved by one witness* at least, it is to be observed,

Rex v. Middle-
zoy.
2 T. Rep. 41.

1. That where a deed is in the hands of the opposite party, and he has notice to produce it, and does so, *it is to be admitted in evidence without proof of the execution of it* ; for being in the hands of the opposite party, it cannot be known who the subscribing witnesses were, and so the party cannot be prepared to prove it.

2. But to this rule are exceptions.

Cafe K. B. 500.

1. As where a witness to a deed, being subpoenaed, did not appear ; but to prove it the party's deed, they proved an indorsement, reciting a proviso within, that if he paid such a sum the deed should be void ; and acknowledging that the sum was not paid, and by the indorsement he expressly owned it to be his deed : upon this it was admitted to be read.

Nash v. Turner.
Espin. N. P.
Cas. 217.

So where there has been an assignment by deed, it is sufficient to prove the assignment by the subscribing witness, without calling the witness to the original deed ; for the assignment having adopted the deed in all its parts, they become as one deed.

Glascock v. Sir
Wm. Warren.
Hil. 12 G. 3.
Bull. N. P. 255.

2. It has been holden, That a *deed to lead the uses of a fine or recovery* may be read without proof of its being executed ; the reason of which seems to be, that by the fine being levied, it appears the parties intended to convey the land to some use or other, and therefore the law will admit of slight proof to shew what use was intended ; since the slightest proof without other to contradict it, will turn the presumption on that side : and therefore though the counterpart of a deed be not evidence in other cases, yet it has been holden so in the case of a fine and recovery ; however, in a case reserved from Hereford assizes by Mr. Justice Fortescue, all the judges were of opinion, *That such a deed to*

Anon.
Salk. 287.

Griffith v.
Moore.
Bull. N. P. 255.

lead

lead the uses of a fine must be proved; and therefore it seems as if the above case and that in *Salkeld* were not law.

3. It has been said, That a deed of bargain and sale inrolled, may be given in evidence without proving the execution of it, because the deed by law requires inrollment, and therefore the inrollment shall be evidence of the lawful execution of it; but that where a deed needs no inrollment, there, though such deed be inrolled, the execution of it must be proved; because since the officer is not intrusted by the law to inroll such deeds, the inrollment will be no evidence of the execution, and the cases in the margin are cited in support of the doctrine: however, it is said by Just. Buller (*N. P.* 255.), that the law may well be doubted, notwithstanding that deeds of bargain and sale inrolled have frequently been given in evidence at *Nisi Prius* without being proved; and in support of the practice the case of *Smartle* against *Williams*, in *Salkeld*, is relied on; but that case is wrongly reported; for it appears by 3 *Lev.* 387. that the acknowledgment was by the bargainor, and so it is stated in *Salkeld*, *MSS.*; besides, it appears from both the books that it was only a term that passed, and so it was no inrollment within the statute.

Bull. N. P. 255.

5 *Co.* 54.
Stile, 445.
1 *Keb.* 117.
Salk. 280.

[774]

4. A deed may be given in evidence on a rule of court by consent, without being proved; for the consent of the parties is conclusive evidence, as the jury are only to try those matters wherein they differ.

1 *Sid.* 269.

5. The deed of a corporation need only be proved to be under the corporation-seal; and there is no occasion for signing or attestation, proof of the seal is sufficient. *Vid. Doe* *c. d.* *Woodmas* *v.* *Mason*, *Espin. N. P. Cas.* 53.

Goodright *ex*
dim. Walling-
ford v. Weston.
Per Willes, C. J.
Abingdon Sum.
Aff. 1754. *MSS.*

6. Though a deed of feoffment be proved to be duly registered, yet it is not sufficient to convey a right, unless livery of seisin be likewise proved; however, where the deed is proved, and possession has always gone according to it, livery shall be presumed; but if possession has not gone along with the deed, the livery must be proved; for since livery is to give possession on the deed, where there is no possession, the presumption is, that there was no livery, and consequently it must be proved, to encounter the presumption: but if the jury find a deed of feoffment, and that possession has gone along with the deed, yet, unless they expressly find a livery, the Court cannot adjudge it a good conveyance; for they are only judges of what is law, and have nothing to do with any probability of fact; therefore they cannot conclude that there was a lawful conveyance, unless the jury find a delivery of the fee.

2 *Roll. Ab.* 132.
Bull. N. P. 256.

7. Where a deed is by law to be inrolled, as deeds under Stat. 27 *H. 8. c. 6.*; so of dutchy leases with the auditor: in such

Kinnerley *v.*
Orpe.
Douglas, 56.

such cases the indorsement by the proper officer in the usual manner, on the back or in the margin, is always admitted as good evidence of the inrollment.

Bull. N. P. 255.

8. Deeds of thirty years standing may be given in evidence, without proof of their execution. In what cases *Vid. ante fol. 259.*

Thompson v.
Miles.
Esp. N. P.
Cas. 184.

9. Where a party, to prove a title, produce a number of old deeds; it was ruled in this case by Lord *Kenyon*, that he should not be obliged to prove such deeds by the subscribing witnesses.

Johnson v.
Mafon.
Ante, 772.

10. Where a deed has been executed under a power of attorney, the power of attorney must be produced.

2. OF INFERIOR WRITTEN EVIDENCE.

1. " *The books of third persons* are good evidence as to any transaction to which they immediately refer."

Per Yates, Just.
Timmins v.
Waugh, Worcester Lent Aff.
1765. MSS.

[775]

In an action concerning tithes, *the books of a rector or vicar who was dead*, was admitted as good evidence; for as he had no interest but for his life, it could not be presumed that he would make any entries that were false, merely for the benefit of his successor, who might be an utter stranger to him; and therefore not like the case of the owner of an estate, who might be presumed to have a partiality for his own family, who were to succeed him.

Smartle v. Williams, cited per Lord Hardwicke in *Montgomery v. Turner*, 1751.
Bull. N. P. 283.

So in this case, where the question was if the mortgage-money was really paid? a *scrivener's book of accounts* (the scrivener being dead) was holden to be good evidence of payment.

Warren ex dem.
Webb v. Greenville.
2 Stra. 1129.

So where a question arose respecting the surrender of a tenant for life, which was necessary in order to establish a recovery which had been suffered: to prove that fact, the debt-book of a Mr. *Edwards*, an attorney at *Bristol*, who was then dead, was offered in evidence; in which book was a charge made by him of 32 l. for suffering the recovery in question; and two articles of it were *for drawing the surrender in question twenty shillings, and engrossing two parts, twenty shillings more*; and it appeared from the book that this bill had been paid: it was held to be admissible and good evidence.

Barry v. Bebington.
4 T. Rep. 514.

So in an action of trespass, the issue was on the soil and freehold of the defendant. At the trial, the plaintiff, who made title under Lord *Barrymore*, offered in evidence sworn entries in a book in the hand-writing of one *Ashley*, who had been steward to Lord *Barrymore* many years back, and who was then dead. The book was a common day-book kept by *Ashley*, containing different matters concerning his different employers, and the entries in question were *memoranda of receipts*

receipts of money by *Ashley*, from different persons by name, for trespasses committed on the common in question, and paid on Lord *Barrymore's* account. The first was in 1739, the last in 1785. This evidence was refused at the trial, and the defendant had a verdict. On a motion for a new trial, the Court were of opinion, that it was admissible evidence, for the receipts were sufficient evidence in law to charge the steward with the receipt of so much money, and therefore were evidence to prove on what account it was received.

2. "So the party's own books are good evidence against him."

In an issue out of Chancery to try whether eight parcels of *Hudson's Bay* stock, bought in the name of Mr. *Lake*, were in trust for Sir *Stephen Evans*: the plaintiffs, his assignees, shewed first, that there was no entry in the books of Mr. *Lake* relating to this transaction: 2dly, Six of the receipts were in the hands of Sir *Stephen Evans*; that there was a reference on the back of them by *Jeremy Thomas* (Sir *Stephen's* book keeper) to the book *B. B.* of Sir *Stephen Evans*: 3dly, *Jeremy Thomas* being proved to be dead, the question was, Whether the book of Sir *Stephen Evans* (referred to, in which was an entry of the payment of the money) should be read? and the Court of *King's Bench* at a trial at bar, admitted it not only as to the six shares, but also as to the other two in the hands of Mr. *Biby Lake*, the son of Mr. *Lake*.

3 May 1738.
Bull. N. P. 282.

In the case of *Cooper v. Marsden, Espin. Ca. N. P. 1.* Lord *Kenyon* held that entries in the books of merchants, bankers, &c. could only be proved by the clerk who made them; and that no other evidence was admissible, though such clerk was abroad, because he might give some material evidence independent of the mere entry from having some acquaintance with the dealings upon which the entry was founded.

So if I. S. seized of two manors, *A.* and *B.* and he cause a survey to be taken of *B.*, and afterwards conveys it to *J. N.*, and afterwards disputes arise concerning the boundaries of the two manors, this survey is good evidence: *aliter* if the two manors had not been in the same hands when the survey was made.

Sir J. Bridgeman v. Jennings.
1 Lord Raym. 734.

3. "A receipt is *prima facie* and presumptive evidence to charge the party with so much money received; but it is not conclusive evidence."

*For where the defendant, together with one *Avarne*, signed a receipt acknowledging to have received the sum of 575*l.* being the consideration money of an annuity: the annuity afterwards being void, and an action brought for the money, it was held, That the defendant might shew

Stratton v. Rastal.
2 Term Rep. 366. and *cas. ibid.*

*[776]

that he was only the surety, and had not received any part of the consideration-money, notwithstanding the receipt; and having done so, he had judgment.

Eristow v. Eastman.
Espin. N. P.
Cas. 173.

But if a receipt in full be given with full knowledge of all the circumstances then depending between the parties, it is a complete bar to the action: *aliter* when given without such knowledge.

Ruffel v. Boheme.
2 Str. 1127.

4. To prove property in a cargo, in an action on a policy of insurance, the plaintiff produced a *bill of parcels* of one *Gardiner at Peterburgh*, with his receipt to it, and proved his hand: it was objected, That this was no evidence against the insurers; but the Chief Justice (*Lee*) admitted it.

M^rAndrew v. Bell. Espin.
N. P. Cas. 373.

So to prove an interest in the insured, the production of the bill of lading, and the evidence of the captain of the ship that he had the goods on board, was held to be sufficient.

5. "The *Gazette* is good evidence of all acts of state, "and in general, sufficient notice as to matters published "in it."

Rex v. Holt.
5 T. Rep. 436.

Therefore in an information against the defendant for publishing seditious writings, in which was an averment that divers addresses had been presented from different parts of the kingdom, expressive of their loyalty and attachment to his majesty; the *Gazette* was held to be good evidence of that averment.

Gowram v. Hope & alt.
Sitt. at West.
after Mic. 1792.
MSS.

But where in an action for goods sold and delivered against three partners, one let judgment go by default, and two of them set up a defence, That the partnership had been dissolved before the goods were furnished which had been delivered to the third, and that notice of the dissolution of the partnership had been inserted in the *London Gazette*, *Ld. Kenyon* said, That that alone was not sufficient, but that particular notice by letter or message should be given beside to all persons who had any transactions with the firm.

Godfrey v. Tumbull & alt.
Espin. N. P.
Cas. 379.
Per *Euller*, Just.
5 T. Rep. 446.

But as to persons who have had no previous dealings with the partnership, it is unquestionably good evidence.

"So other matters printed by the King's Printer are good "evidence; as the Articles of War."

6. Notes of hand and bills of exchange also rank under this head; of which I have already treated at length.

Biggs v. Lawrence.
3 T. Rep. 454.

7. A letter from an agent acknowledging the receipt of goods, is good evidence against the buyer.

Note; It is however to be observed in general, that most instruments, whether of a public or private nature, now usually

usually given in evidence, are by several statutes required to be stamped; without which they cannot be admitted.

As to this it has been resolved,

1. "That each instrument to which a stamp is required, must, if given in evidence, be properly stamped."

For where in a *quo warranto* for usurping the office of burghers, the defendant's admission was produced, and it appeared that five persons were included in one admission which was stamped, but four other blank papers regularly stamped were annexed to it: this was adjudged to be bad; for that each admission should be distinct and properly stamped. Rex v. Reeks.
2 Stra. 716.

2. "As the revenue is the object of the stamp-duties, though every distinct instrument has a distinct stamp, it has been held, that if the amount of the duty is paid, the Court will admit an instrument to be given in evidence, though not stamped with the proper stamp which such instrument requires." [777]

For where in *assumpsit* for use and occupation, the defendant offered in evidence a demise by deed of the premises in question, which would have nonsuited the plaintiff under stat. 11 Geo. 2. c. 19.: on being produced, it was not stamped with the stamp required for leases; but was on an agreement-stamp: for this it was objected to; but it was answered, That the stamp for leases was a six shilling stamp, and that for agreements of the same amount; and therefore the amount of the stamp-duties being satisfied, that that was sufficient: the Judge was of that opinion, and admitted it to be given in evidence. Allen v.
Thomas.
Sum. Ass.
Maidstone,
1791.
Coram Gould,
Just. MSS.

"But the law is now otherwise, and every instrument must have the appropriate stamp, or it is inadmissible in evidence."

But if the stamp required for any instrument consists of many sums laid on by different acts of parliament at different times, such only should be put to the instrument offered in evidence; a stamp *ad valorem* will not be sufficient. Robinson v.
Drybrough.
6 T. Rep. 317.

Though where the whole of the stamp duty is laid on by that act of parliament, a stamp *ad valorem* is sufficient. Aitcheson v.
Sharland.
Esp. N. P.
Cas. 293.

3. "Though parol evidence might be sufficient to prove any matter or agreement, yet if the party will reduce it into writing it cannot be given in evidence, unless it is stamped."

For where a written agreement in these words, "*A. doth let and sell to B. for the term of three years,*" was offered in evidence in an action of *assumpsit* on a special agreement, the defendant objected to its being read, because it was a lease and not stamped: for the plaintiff it was said, that it was only a memorandum of a parol lease, which being for three Prosser v. Phil-
lips.
Hereford Sum.
Ass. 1765.
Coram Perrot,
Baron.
Bull. N. P. 269.

three years only, is good as such; and the statute in using the words "indenture, lease, or deed-poll," meant only deeds: but it was holden, That though a parol lease for three years is good, yet if a man through caution will reduce it into writing, he must pay for the stamp, otherwise the court are inhibited from receiving it in evidence.

May v. Smith.
Espin. Caf. N. P.
283.

So where to prove the dissolution of a partnership, the copy of the advertisement inserted in the *Gazette*, giving notice of the parties having come to agreement to dissolve partnership, was offered in evidence; on an objection being taken, that it was an agreement, and ought to have been stamped, it was answered, that it was not an agreement, but merely given in evidence to shew that the parties had in fact dissolved partnership. But Lord *Kenyon* held, that every paper to be given in evidence in proof of any agreement ought to be stamped; and therefore rejected it.

4. "By stat. 1 *Ann.* stat. 2. *ch.* 22. *s.* 2. "Persons are forbidden to write again on a paper before stamped and written on, unless such paper shall be re-stamped, or to erase or change the name, or affix another piece to a stamp used before, under a penalty," &c. &c.

Under this statute it has been held,

Stonelake v.
Babb.
5 *Burr.* 2673.

That where a person gave a letter of attorney to two persons therein named, to receive money for him in *Newfoundland*; that they did not receive it, but applied merely for payment; upon which the person erased the names of the persons so before appointed attornies, and put another in their stead to receive the same money and from the same person: it was held, that this was within the penalty of the statute.

Rex v. Bishop
of Chester.
1 *Stra.* 625.

* But when the penalty is paid, and it is then stamp, it may be given in evidence.

* [778]
Bowman v.
Nicholl.
Espin. N. P.
Caf. 81.

So where in *assumpsit* on a bill of exchange, the bill was drawn the 2d of *September*, payable 21 days after sight; while the bill remained in the hands of the drawer, it was altered with the consent of the acceptor, and made payable 51 days after sight. On the 30th of *September*, when it was over-due according to its original tenor and date, it was again altered and made payable at 21 days, after which it was negotiated, and the action brought on it; but the old stamp still remained, nor was any new stamp added. Lord *Kenyon* held, that every alteration made it a new instrument, and a new stamp necessary, and therefore nonsuited the plaintiff.

5. By stat. 23 *Geo.* 3. *c.* 58. "All agreements in writing, whether the writing be only evidence of the contract, or obligatory upon the parties from its being a written instrument, are required to be stamped; but there are the following exceptions, viz. memoranda or agreements for

"leases

" leases at a rack rent of any messuage under the yearly value of 5*l.*: for the hire of any labourer, artificer, manufacturer, or menial servant: any memorandum, letter, or agreement, for or relating to the sale of goods, wares, or merchandize, where the matter of memorandum or agreement shall not exceed 20*l.*; or any memorandum or agreement made in *Scotland*, if stamped with the duty required there."

In this case, which was *assumpsit* on the defendant's undertaking, to pay the debt of his mother, who was in trade, which he conducted for her, but had no share in the profits. The undertaking was by a letter which was not stamped. It was adjudged, that as this letter was written in the fair course of business, on account of the trade, and by which he bound himself to another tradesman, was within the exceptions of the statute, and did not require a stamp.

Mackenzie v. Banks.
5 Term Rep.
176.

6. " As to how stamped copies may be given in evidence."

There are two sorts of copies of proceedings; a *close copy* which might be given in evidence in another court, and *office copies* which are equivalent to the record itself when made use of in the same court in the same cause; the office-copy is fixed to a certain number of words in a sheet, in order to ascertain the officer's fees; but copies to be given in evidence might be written as close as the writer pleased; the stamps mean to prevent any frauds in the office-copies by the parties compounding with the officers for their fees, and then writing a more than usual number of words in them, but did not mean to fix close copies to any number of words in a sheet.

Den v. Fulford.
Per Lord Mansfield.
2 Burr. 1181.

2. OF THE RULES ADOPTED BY THE COURT, UNDER WHICH EVIDENCE IS TO BE GIVEN.

1. " The first rule of evidence is, That in every issue Bull. N. P. 298.
" the affirmative is to be proved."

This rule is founded on the nature of things, as a negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed till it be proved; but when the affirmative is proved, the other party may then contest it by opposite proofs; for that is not properly the proof of a negative, but of a proposition totally inconsistent with what is affirmed.

Ibid.

As in trespass, if the defendant be charged with a trespass generally, he need only make a general denial of the fact; but if the fact be proved, he may then prove another proposition inconsistent with the charge, as that he was at another place at the time, or the like.

Ibid.

“ But to this rule is an exception of such cases, where
 “ the law *presumes the affirmative*; in which case the other
 “ party is put on proof to impeach it.”

Bull. N. P. 298. As the law presumes that every man does his duty until the contrary is proved; therefore in an information against Lord *Halifax*, for refusing to deliver up the rolls of the auditor of the exchequer, the Court put the plaintiff upon proving that he had not delivered them up.

Ibid. 2. “ A second general rule is, That no evidence need be
 “ given of what is agreed by the pleadings; for the jury
 [779] “ are only to try the matter in issue between the parties, so
 “ that nothing else is properly before them.”

Dyer, 183.
 c. 58.
 Bull. N. P. 298. As in *replevin*, the defendant avowed the taking the cattle in the *locus in quo*, as parcel of his manor of *K.*: the plaintiff replied, That it was parcel of the manor of *K.*, and made title to it, and traversed that the manor of *K.* was the freehold of the defendant. At the trial he was not admitted to prove that *K. was no manor*, for that was admitted in the pleadings, and the issue was to whom it belonged.

Bull. N. P. 298. “ So the jury cannot find any thing against that which
 “ the parties have affirmed and admitted of record, though
 “ the truth be contrary.”

Anon.
 Pasch. 4 Ann.
 K. B. Salk.
 MSS. Bull. N. P.
 298.
 This case was before the stat. of Ann. which enables the defendants to plead double.
 As in *trespass* for throwing down and carrying away stalls: As to all the trespasss, *except the throwing down*, the defendants pleaded not guilty; and as to the throwing down, they pleaded a special justification, and therein justified both the throwing down and the carrying away: on issue joined, the judge at the assizes would not try *whether the defendants were guilty or not of the carrying away*, because they had confessed it by their justification: and on a motion for a new trial, the Court held the judge's directions to be right; for the jury could never find the defendants to be not guilty of that which they had confessed on the record, though in another issue.

“ But there may be a matter on the face of the pleadings
 “ which may be an estoppel to the party to aver against it;
 “ but which nevertheless the jury shall not be concluded
 “ by.”

Goddard's case.
 2 Co. Rep. 4. 6. As in debt on a bond of intestates by the administrator, bearing date 4th of *April 1572*, the defendant pleaded that the intestate was dead before the date of the bond, and *sic non est factum*: on issue joined, the jury found that the bond was delivered 30th of *July 1571*, and that the intestate was then living: the Court held, That though it was an estoppel as between the parties to aver against the deed, yet it was none as to the jury, who were sworn to find the truth; and the plaintiff had judgment. *Note*; It was agreed in this

this case, that the date of the deed was not of the substance of it; for if there be no date, or a false or impossible date, as 30th of February (*ex. gr.*), yet that the deed was good.

3. "A third general rule of evidence is, That where-
"ever a man cannot have advantage of any special matter,
"by pleading that he may give it in evidence under the
"general issue." Co. Litt. 283. [780]

As where in debt on a bond and plea of bankruptcy, the plaintiff offered the condition of the bond in evidence, to shew that the debt was not barred by the bankruptcy (it being a bond not then due or payable); this was objected to, on the ground that the declaration was general; and the plea admitted the bond as stated, and so not in issue; and that if the plaintiff intended to have relied on the condition, that he should have pleaded it: but it was resolved, That the evidence was good and admissible; for pleas of bankruptcy under stat. 5 Geo. 2. always conclude to the country, so that the plaintiff had no opportunity to put the condition on the record; and therefore, as he could not have advantage of it by pleading, that he should be admitted to give it in evidence. *Alfop v. Price. Douglas, 155.*

So no man can justify the killing of another; therefore he may give the special matter in evidence. Co. Litt. 283.

So in *trover* the defendant may give a special justification in evidence, because he cannot plead it: *aliter* in trespass where he can. 1 Jones, 240.

4. "A fourth general rule of evidence is, That the best
"evidence which the nature of the thing admits and is
"capable of, must always be given." Bull. N. P. 293.

The true meaning of this rule is, That no such evidence shall be brought: that *ex natura rei* supposes still better evidence behind in the parties power or possession; for such evidence is altogether insufficient and proves nothing, as it carries a presumption contrary to the intention for which it is produced; for if the other greater evidence could make for the party, why was not it produced? Ibid.

Therefore a letter written by an agent or broker by whom a sale of goods has been made, is not evidence where the broker himself may be called to explain the whole of the transaction. *Maesters v. Abraham. Espin. N. P. Cas. 780.*

This rule therefore consists of two parts: 1st, It must be the best evidence: 2. It must be in the party's possession or power; for if not, it is not his default that it is not produced: therefore, where any deed or other instrument *appears to be lost*, without any fault in the party, in such case a copy is good evidence. Bull. N. P. 294.

1. "Therefore, no parol evidence of any fact or agreement shall be admitted where there is written evidence of such fact; for written evidence speaks for itself, is liable to no perversion or misconstruction, and is more accurate than memory can be, which is uncertain and fallible."

[781]

It is therefore the constant practice at *Nisi Prius*, in case a witness mentions any matter which has been reduced into writing, to call for the writing; and if not produced, or not proved to be lost, to reject evidence of such matter or fact.

"So upon the same ground, and under the statute of frauds, where any written evidence is produced, parol evidence is never admitted to add to or vary it in any respect."

Meres v. Anfel
& alt.
3 Will. 275.

As where in trespass the case was, that the plaintiff being possessed of two closes, called *Millcroft* and *Boreham's Field*, came to an agreement in writing with the defendants, to give them the grass and hay off *Boreham's Meadow* in exchange for their copper-mill, &c. the trespass was committed by the defendant's entering on *Millcroft*: at the trial, parol evidence was admitted, to prove that at the time it was agreed between the parties, that beside *Boreham's Field*, the defendant was to have the possession and soil of *Millcroft*; and the defendant had a verdict: the Court set the verdict aside, such evidence being against law.

Lowfield v.
Stonham.
2 Stra. 1261.

So where upon *plene administravit*, the question was, a man gave "to his brother *John* (the testator) 1000*l.* and in case of his death, to his wife *Susannah*:" *John* survived the testator, and the wife (the defendant) received the legacy; the plaintiff insisted that the 1000*l.* vested absolutely in *John*, and so was assets in her hands: she offered parol evidence, to prove that the testator in extremis declared that he meant only to give the interest of it to his brother for life, and that she should have the principal in case she survived him. Ch. Just. Lee rejected the evidence.—*Vid. Preston v. Mercieu*, ante fol. 20. *Gunnis v. Erhart*, ante fol. 12. and *Finney v. Finney*, 1 Will. 35.: all which cases establish the same point.

Rex v. Inhabitants of Scamonden.
3 T. Rep. 474.

However, in this case, in which the question was concerning the settlement of a pauper by purchase of a tenement, the consideration expressed in the deed was 28*l.*; the Court were of opinion, That it was admissible to give evidence, that in point of fact 30*l.* had been paid.

It is a general rule, that the subscribing witness to any instrument must be produced to prove it; but by stat. 26 G. 3. c. 57. s. 58. deeds executed in the *East Indies*, and attested by witnesses there, may be given in evidence, on proof

proof of the hand-writing of the parties and the witnesses.

In some cases however of written evidence, parol evidence is admitted to explain it, as in rule *postea*.

2. Under this ground of the best evidence being always required, *copies* of any instruments or proceedings are not admissible evidence, except in some particular cases, as the originals are the best evidence. Bull. N. P. 294.

* Therefore where in a question on a presentation by a patron to a living, a *copy from the bishop's institution-book* was held not to be sufficient evidence, for it was not the best evidence that could be had; the presentation under the hand and seal of the patron was better evidence, so was the institution-book itself. Tillard v. Shebeare. 2 Will. 366. * [782]

So on an indictment against the defendant for setting his house on fire; to prove it insured, an *entry in the books of one of the fire insurance offices* was offered in evidence; but Lord Kenyon refused to admit it, notice not having been given to produce the original policy, for *that* was the best evidence. Rex v. Doran. Espin. N. P. Cas. 127.

But in the following cases, copies are admissible.

1st. If the *original is proved to be lost or destroyed* (*ante* fol. 177.); for then in fact the copy is the best evidence. Bull. N. P. 294.

2. If the *original is proved to be in the hands of the opposite party*, in such case a copy may be given in evidence, if such party refuses to produce it upon notice given to do it; or in such case parol evidence may be given of its contents. Ibid. Per Ld. Mansfield. 4 Burr. 2488.

And where a deed is in the possession of the opposite party, and he, after notice, refuses to produce it, an examined copy is evidence, without proof of the party's execution of it. And though there were two originals, if the party who is proved to have possession of one does not produce it, and the other party has not the other, a copy is, notwithstanding, evidence. Doxon v. Haigh. Espin. N. P. Cas. 782.

It has however been said, that there is a difference in civil and criminal cases or penal actions, as to the necessity that a party is under to produce evidence against himself on his receiving notice to do it; and it has been doubted whether in the latter cases a party is obliged to do it; but however, all distinction as to that is completely over-ruled by the following case: 4 Burr. 2488.

This case was an information grounded on stat. 7 G. I. c. 21. for importing tea into *Guernsey*, which had not been first loaded and shipped in *Great Britain*; in the course of the trial the *Attorney General* offered to give in evidence copies of letters from the defendant to one *Channon*, who was the witness for the crown respecting the tea; but which Attorney General v. Le Merchant. Cit. 2 T. Rep. 2016

Per Buller, Just.
2 T. Rep. 201.

which letters were then in the defendant's own possession, Channon having become a bankrupt, and by an order of the Chancellor, all his papers having been seized, and delivered up to the defendant; but while they were in the hands of the clerk to the commission, the solicitor for the excise had contrived to get copies of them: at the trial the objection was taken to the reading them, on the ground that this was a criminal prosecution, and that therefore the defendant was not bound to produce this evidence against himself: but the objection was over-ruled by Baron Eyre; and on a motion for a new trial, the Court was of the same opinion; so that now there is no distinction in this respect between civil and criminal cases.

Per Holt.
3 Salk. 154.

2. "A second case in which a copy is admissible evidence, is where *the original is of a public nature*; for wherever the original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof is "evidence." As,

Jones v. Randall.
Cowp. 17.
Douglas, 572.
in not.

* 1. *A copy of the Journals of the House of Lords* respecting the reversal of a decree, was in this case adjudged to be good evidence.

* [783]
Rex v. Lord G.
Gordon.
Douglas, 569.

2. *Sworn copies of the entries in the Journals of the House of Commons* were produced as evidence on the part of the crown, and admitted.

Ibid. in not.

3. *Copies from the transfer-books of the East India Company* have been held to be good evidence.

Brocas v. Mayor
of London.
1 Stra. 387.

4. *Poll-books at an election* are of a public nature, and a copy of them shall be evidence: on a suggestion of fraud or rasure only shall the originals be produced.

Warrener v.
Giles.
2 Stra. 954.

5. *The city books*, in which are entered the boundaries of the public markets, are books of a public nature, and copies of them are evidence.

3. "A third case in which copies are evidence, is where "they are *made so by statute.*"

Jansen v. Wil-
son.
Douglas, 244.

1. As under stat. 5 Geo. 2. c. 30. "By which the depositions, proceedings, &c. under commissions of bankrupt are ordered to be recorded, and *that copies of them* shall be "evidence."

3 T. Rep. 712.

2. By stat. 16 Geo. 2. justices of peace are empowered to summon any foldier having a wife or child before, and to cause him to make oath as to his last place of legal settlement; a *copy of which affidavit*, properly attested, shall be evidence of the place of settlement, stat. 32 G. 2.

4. But copies are to be given in evidence, under the following restrictions:

1. If

1. If a copy of a deed or such like instrument is offered in evidence, on the ground of the original being lost, it must be proved by a witness who compared it with the original; otherwise there would be no proof of the truth of the copy, or that it had any relation to the deed.

1 Mod. 4.
Vid. ante
Doxon v.
Haigh, 782.

2. Where a copy is in like manner offered in evidence, sufficient probability must be shewn to the Court to satisfy them that the original was genuine, as well as that it was lost, before the party shall be admitted to read it.

Goodier v. Lake,
1 Atk. 446.

3. " But notwithstanding the rule is thus generally laid down yet in some instances the Court have admitted an inferior species of evidence."

As in this case, which was an action against an officer of the *Post-office* for interfering in an election, the Court were of opinion, That it was sufficient for the plaintiff to shew the defendant's acting as such, without bringing proof of his being appointed by the *Post-office*.

Crew v. Saunders.
2 Stra. 1005.

[784]

So in an action by the plaintiff under stat. 27 G. 3. c. 26. for the penalties under the *Post-horse* duty, brought by the farmer, it was held not necessary for the plaintiff to give in evidence his appointment by the Lords of the *Treasury*, or by the commissioners of the stamp-duty; it was sufficient proof, if the defendant had accounted with the plaintiff as farmer of the duties, and paid him as such.

Radford q. r.
v. Macintosh.
3 Term Rep.
632.

So in an action against the defendant for non-residence, the plaintiff is not called upon to prove admission, institution, and induction, in order to maintain his action; it is sufficient for him to prove the several acts done by the defendant as parson; as receiving the tithes, serving the church, &c.

Bevan q. r. v.
Williams.
3 Term Rep.
635. in not.

So where the action was by an attorney for slanderous words used of him in his profession; it was adjudged not to be necessary to prove him an attorney by his admission on a copy of the roll, but that his having acted as such was sufficient.

Berryman v.
Wife.
4 T. Rep. 566.

5. A fifth general rule of evidence is, " That hearsay is no evidence."

For as evidence upon oath is only admissible in a court of justice, the first speech being without oath, the oath of another only going to prove that it was said, proves but a bare speaking, and so is of no weight or importance; besides, if the person who spoke the first words be living, what he has been heard to say is not the best evidence.

Bull. N. P. 294.

1 Mod. 283.

1 Mod. 283.

But 1st, Though hearsay be not allowed as direct evidence, yet it may be admitted in *corroboration of a witness's testimony*, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself; but this is not evidence in chief; and it is doubtful if it is so in reply.

Holliday v.
Sweeting.
M. 16 G. 3.
Bull. N. P. 294.

But what a party has himself been heard to say respecting the matter in dispute, is good evidence against himself; as in the case of the admission of a debt *ex gr.*; so are conversations which have passed in the hearing of the party respecting the matters in difference, and which were uncontradicted or admitted by him, good evidence; as is the constant practice at *Nisi Prius*.

Rouse v. Red-
wood.
Espin. N. P.
Cas. 155.

But any admission of a demand or confession to that effect made by a defendant, when he is arrested, and is ignorant whether he is bound by law to the payment of a demand or not, is not admissible evidence to charge him.

Waldrige v.
Kennison.
Espin. N. P.
Cas. 143.

So any admission made by a person under a treaty to compromise a suit, relative to the matters in dispute, is not evidence against him; but any admission of a matter not connected with the merits of the case, as of a hand-writing *ex gr.*, is admissible.

2. "Where positive proof is not to be had, *the declarations of persons uninterested, and who are then dead*, are admissible."

Bull. N. P. 294.
Per Lord Mans-
field.
Cowp. 594.

[785]

1. As in questions concerning *legitimacy*; for it is the practice to admit evidence of what the parents have been heard to say respecting their being married or not; for the presumption arising from cohabitation is strengthened or destroyed by such declarations, which are not to be given in evidence directly, but as reasons for the witnesses belief one way or the other.

Grimwade v.
Stephens, in
Kent, 1597.
Bull. N. P. 294.

2. So hearsay is good evidence in cases of *pedigree*, as to prove who was a man's grandfather; what children he had; when he married, &c., of which it is reasonable to presume that better evidence could not be had; for matters of no direct importance, such as those now mentioned, are only known by reputation; for no written memorial of such matters is usually kept.

Duke of Athol
v. Ashburnham.
E. 14 G. 3.
Bull. N. P. 295.

As in this case, which was an ejectment; Mr. Sharp, who was attorney in this cause, was admitted to give evidence what a Mr. Worthington had told him he heard and knew respecting the pedigree of the family, Mr. Worthington then being dead.

Rowe v. Has-
land.
1 Black. Rep.
404.

In ejectment, evidence was given that one James Hasland (whose title, if living, or that of his issue, would super-
sede

fede that of the lessor of the plaintiff) was living, a poor labouring man at *Liverpool*, sixty years ago; five witnesses deposed, That they believed he was dead without issue, but knew nothing certain; the plaintiff produced the register of *Waltham*, to shew that one *James Hasland* was buried in 1707; but this name plainly appeared to have been altered from *Harrox*, but by whom or where did not appear: Justice *Clive* left it to the jury to decide, Whether *Hasland* died without issue or not? and the jury found for the plaintiff. On a motion for a new trial, *per Lord Mansfield*—In establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. Many persons go to the *East* and *West Indies*, and are never heard of again: what is done on such a trial is no injury to the man or his issue, should they ever appear, and claim the estate; it was proper evidence to be left to the jury, and the rule for a new trial was discharged.

3. "Hearsay is good evidence to prove the death of any relation beyond sea." Bull. N. P. 294.

As evidence by a person who knew the family, That he had heard in the family that such a person of it had died abroad, and that it was believed in the family: so that such a person died without issue; and such shall be sufficient to entitle the person next in remainder.

Roe ex dim.
Ellerbrook v.
Clerk.
Sitt. Hil. 1791.
MSS.

4. "Hearsay is evidence in cases of settlement of paupers."

*As where on an appeal the evidence was, That the husband of the pauper told her that he had been hired to one *Smith*, but had been turned away to prevent his gaining a settlement, the Sessions rejected the evidence as mere hearsay and inadmissible: on the case coming before the Court of *King's Bench*, they held clearly, That it ought to have been admitted.

Rex v. Nutley.
Bott. Sett. Caf.
334. cit.
3 T. Rep. 715.
* [786]

The order stated, That the pauper was the daughter of *George Wall*, deceased, who in his lifetime had declared to the witness, that he was settled in *Greenwich*, by hiring and service to a Captain *Saunders*; and the order was affirmed on this evidence of the declarations of the father alone: and it was held to be good.

Rex v. Greenwich.
Bott. Sett. Caf.
281. cit.
3 T. Rep. 716.

In this case the doctrine above was admitted and established, and the Court went still further, admitting the wife to give evidence of her husband's declarations as to his settlement, he then being abroad and living.

Rex v. Holy Trinity, in Wareham.
Caldec. Sett. Caf. 141.

5. "Another case in which hearsay is evidence, is "whether *parcel or not parcel*?" *Vid. ante, Davis v. Pearce, 2 Term Rep. 53. and Holloway v. Raikes, ibid. cit. Ch. of Ejection.*

6. "In questions of *prescription*, hearsay is good evidence "in order to prove a general reputation."

Skinner v. Lord Bellamont. Worcester, 1744. Bull. N. P. 295.

As where the issue was on a right of way over the plaintiff's close, the defendant was admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed.

7. "What commences by parol may be transmitted by "parol, and that creates a general reputation; in which case "hearsay is admissible evidence."

Bishop of Meath v. Lord Belfield. 1747. Bull. N. P. 295.

In a *quare impedit*, the plaintiff derived his title from Ld. R. in whom he laid a presentation of one *Knight*; the bishop set up a title in himself, and traversed the seisin of Lord R.; the plaintiff gave in evidence an entry in the register of the diocese, of the institution of *Knight*, in which there was a blank in the place where the patron's name is usually inserted, and then offered parol evidence of the general reputation of the country, that *Knight* was in by the presentation of Lord R.: upon a bill of exceptions this came on in *K. B.*, when the better opinion was, That the evidence was admissible, the register, which was the proper evidence, being silent; for a presentation may be by parol, and what so commences may be transmitted to posterity by parol, and that creates a general reputation.

[787]

8. "And on this head it is in general to be observed, "that it is no objection to the admission of hearsay evidence, that the party whose declarations are brought as hearsay evidence, would be himself an inadmissible witness, provided "such declarations at the time were indifferent, and used "without reference to the question then before the Court."

Rex v. Inhabitants of Hammersmith. Sitt. West. Hill, 1776, MSS.

As where the question was respecting the boundaries of the parish of *Acton* and the hamlet of *Hammersmith*, a witness for the defendant proved that an old man, now dead, had told him twenty years before, respecting the boundaries of these parishes, but the old man had been an inhabitant of the hamlet of *Hammersmith*; this evidence was objected to, because the person who had made the declaration was interested: but Lord *Mansfield* ruled it to be good evidence; for at the time the conversation took place, there was no question or dispute about the matter, nor could it be supposed that a man would hold a conversation, in order to make it evidence twenty years after.

5. "Under the last rule it was observed, That parol evidence could in no case be admitted to explain written; "but

“ but it is a rule of evidence, that where there is a doubt on
 “ the face of the words respecting the matters to which
 “ they refer, in such case parol evidence may be admitted to
 “ ascertain such facts.” Bull. N. P. 297.

This *ambiguitas*, or doubt of the construction, is divided
 by Lord Bacon into *ambiguitas latens* & *patens*.

Ambiguitas latens is that which seems certain, and with-
 out doubt for any thing that appears on the face of the
 deed or instrument; but there is some collateral matter
 out of the deed or instrument which creates the ambi-
 guity.

“ Where the ambiguity is of this nature, parol evidence
 “ is admissible, for the instrument itself being certain, but
 “ the doubt arising from something extrinsic, extrinsic mat-
 “ ter should be admitted, particularly as it fortifies and gives
 “ effect to the written evidence.”

“ But where any implication or construction of law arises
 “ from any written evidence whatever, parol evidence may
 “ be admitted to explain that implication; for that is not
 “ to alter the written instrument itself.”

As where a fine is levied if no uses are declared, the
 resulting uses shall be to the conuser; but parol evidence
 is admissible to rebut the presumption of such resulting
 uses. Roe v. Pophant.
 Dougl. 24.
 Lord Altham v.
 Lord Anglesea.
 Cit. Dougl. 26.

* So the implied revocation of a will by a subsequent mar-
 riage and birth of a child, is liable to be rebutted by parol
 evidence. Brady v. Cubitt.
 Dougl. 30.
 * [788]

So where a man devised four hundred pounds to his wife,
 and made her executrix without disposing of the surplus;
 Lord Hardwicke admitted parol evidence to shew the testa-
 tor meant his wife should have it; for there was no ambi-
 guity in the will, nor was it to alter the apparent intent of
 the testator; for by law she was entitled to the surplus as
 executrix, and therefore the evidence was only to rebut the
 equity. Lake v. Lake.
 8 Nov. 1751.
 Bull. N. P. 297.
 1 Willf. 313.
 Vid. Walker v.
 Walker.
 2 Atk. 98.

But in this case, the testator having expressly devised the
 residue of his personal estate to his executors, one of whom
 owed him money on bond, parol evidence was refused to be
 admitted, to prove the testator meant to extinguish the bond-
 debt, by making the obligor executor; for that would have
 been to alter the apparent intent, and not merely to rebut an
 equity. Brown v. Sel-
 win, in Dom.
 Proc.
 Bull. N. P. 297.

As where the testatrix devised her estate to her cousin
John Cleere, and there was both father and son of that name;
 it was held that parol evidence was admissible to prove that
 the son of that name was the person meant; for as the ob-
 jection Jones v. New-
 man.
 Trin. 24 G. 2.
 Bull. N. P. 296.
 1 Black. Rep.
 60.

Cheney's case.
5 Co. S. P.

jection arose from parol evidence, parol evidence ought to be admitted to answer it.

Vid. Thomas v. Thomas, 6 Term Rep. 671.

2 Roll. Ab. 676.

So if a man has two manors of the same name of *Dale*, and he levies a fine of the manor of *Dale* generally; parol evidence and circumstances may be given in evidence, to shew which manor he intended; for that would not be to contradict the record, but to support it.

Bull. N. P. 297.

Ambiguitas patens is that which appears on the face of the deed or instrument, and is in fact an omission, and can therefore never be supplied by an averment; for that in effect would be to make that pass without deed, which the law appoints shall not pass without deed.

Baillis &
Church v. At-
torney-Gener-
al.
29 Jan. 1714.

As where there was a devise in a will, but the devisee's name was totally omitted: it was held that parol evidence was inadmissible to shew who was meant; for that would be to add to a written instrument.

6. A sixth general rule of evidence is, "That in all cases where general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally."

2. "It therefore often becomes doubtful whether general character is so put in issue or not."

Clarke v. Peri-
ans.
27 July 1742.
Bull. N.P. 295.
* [789]

* In this case, which was a bill filed by a kept-mistress for an annuity, the defendant in his answer, said, "That she was a woman of infamous character before Mr. *Perians* became acquainted with her;" this was holden to be a sufficient putting of her character in issue to enable the defendant to prove particular facts.

Lord Doneraile
v. Lady Do-
neraile, in Dom.
Proc. 1734.
Bull. N.P. 296.

But where to a bill brought by the wife, the husband in his answer, said, "She had not behaved herself with duty and tenderness to him, as became a virtuous woman, much less his wife;" this was holden not to put adultery in issue, so as to enable the husband to prove particular facts.

Roberts v.
Malston.
Per Willes, C. J.
at Hereford,
1745.
Bull. N. P. 296.

2. In *actions for criminal conversation*, the defendant may give in evidence particular facts of the wife's adultery with others, or having a bastard before marriage; for by bringing the action the husband puts her general character and behaviour in issue, and as the defendant may examine as to particular facts, *a fortiori* he may call witnesses to her general character.

Bull. N. P. 296.

3. In *criminal prosecutions*, where the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts; for it is impossible without it to prove his charge.

An exception to this is the case of *indictments for barratry*, Bull. N. P. 296. in which case the prosecutor cannot examine as to particular facts without giving previous notice of it to the defendant; for these prosecutions being commonly against attornies, whose profession it is to follow law-suits, and it is difficult to draw the line between that and acting as a barrator, it is therefore required that the defendant should know what particular facts are to be given in evidence, in order that he may be prepared to shew that he was fairly and professionally employed in those things.

But in other criminal cases the prosecutor cannot enter *Ibid.* into the defendant's character, unless the defendant enable him so to do, by his calling witnesses in support of it, and even then *the prosecutor cannot examine to particular facts*; the general character of the defendant not being put in issue, but coming in collaterally.

4. In an ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, he shall not be permitted to call witnesses to prove his general good character. *Goodright ex dim. Farr v. Hicks. Winton Sum. Ass. 1789. Coram Buller, Just.*

5. As to how far the characters of *witnesses* may be questioned on trials, it is settled,

* 1. If you will impeach the credit of a witness, you can only examine into his general character, and not to particular facts; for every man is supposed to be capable of supporting the one; but it is not likely he should be prepared to answer the other without notice: and unless his general character and behaviour be in issue, he has no notice. *Bull. N. P. 296. * [790]*

But other witnesses may be called to impeach his credit respecting any matter relative to the issue; for whatever is material to the issue, each party must come prepared to prove or to deny. *Hardwell v. Jarman. Taunton Lent Ass. 1789. Coram Buller, Just.*

But a party shall never be permitted to bring general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. *Hastings's case: Per Lord Thurlow, Chanc. 11 June, 1789. In Dom. Proc. Bull. N. P. 297.*

But if a witness proves facts in a cause which make *Bull. N. P. 297.* against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness; but the impeachment of his credit is incidental and consequential only.

Per Ashhurst, J.
Taunton Sum.
Ass. 1773, after
consulting with
Baron Adams.
Bull. N. P. 297.

If a particular fact go to the competency of a witness, it may be proved by other testimony; as the copy of a record for perjury, felony, &c. so of an interest in a witness in the event of a cause: and whether he be interested or not, shall be decided by the judge.

9. Another rule of evidence is this, "That if the substance of the issue be proved, it is sufficient."

This rule depends upon ascertaining how far the words *modo & forma* used in joining issue is of the substance of the issue; for where it is so, it must be proved.

To ascertain this, an attention to the point really to be tried between the parties, seems to be the best rule.

Co. Litt. 281.

As in an action of waste for cutting *twenty ashes*, proof that the defendant cut *ten* is sufficient; for the issue is waste or no waste.

2 Roll. Ab. 706.

But if the issue be whether "*Lord Delawar demised*" or not? proof that *A. B.* who was *not then, but now, Lord Delawar*, is not sufficient; for whether he were *Lord Delawar* at the time of the demise is the issue.

[791]

But, however, the rule is thus laid down: 1st, That where the issue is joined on the point of the action, there *modo & forma* are mere form, and need not be proved.

Pope v. Skinner.
Hob. 72.

As where in *replevin* the defendant avowed the taking as a commoner, damage feasant, the plaintiff in bar said that *I. S.* was seised of an house and land whereto he had common, and *had demised to him the 30th of March* to hold from the Feast of the Annunciation next before for a year; the defendant traversed the lease *modo & forma*: the jury found that *I. S.* made a lease *on the 25th of March*, to the plaintiff for one year; and though this be not the same lease pleaded on account of the difference of the day, yet the plaintiff had judgment; for the substance of the issue is, Whether the plaintiff had such a lease, by force of which he might use the common? yet it must not depart altogether from the form of the issue, as if it had been found that he had a right of common *by lease from another*, that would have been bad.

Bull. N. P. 200.

Co. Litt. 202.

2dly, "But where a collateral point in pleading is traversed, then *modo & forma* is of the substance of the issue, and must be proved."

Ibid.

As if a feoffment be alleged *by two*, and this is traversed *modo & forma*, and this is found the feoffment of *one*, there *modo & forma* is material.

Ibid.

So if a feoffment be pleaded *by deed*, and it is traversed *absque hoc quod feoffavit modo & forma*, the jury cannot find a feoffment without deed.

10. "The

10. " The last rule of evidence to be observed is, that
" confessions or admissions made for the purpose of a com-
" promise, or in confidence, are not to be admitted to be
" given in evidence."

Such are the confidential communications made by a client
to his attorney. *Ante.*

And on the same principle, where the defendant was a fo-
reigner, and in his communication with his attorney it be-
came necessary to employ an *interpreter*, it was ruled by Lord
Kenyon, That the interpreter was bound to equal secrecy
with the attorney, and could not give evidence of what had
so been communicated.

Du Barre v.
Livette.
Peake, N. R.
Cas. 77.

But in the above case was cited a case of *Rex v. Sparkes*,
before Mr. Justice *Buller*, where on an indictment for a cri-
minal offence, a confession made by the prisoner, who was a
papist, to a Popish priest, was admitted in evidence, and the
party on it convicted and executed.

So an admission of an hand-writing to a bill of exchange,
upon which the action was brought, made pending a treaty
for a compromise, was held not to be within the rule above
laid down, as not going to the merits of the cause, and as
being a matter capable of being easily proved by other
means.

Waldridge v.
Kennison.
Esp. N. P. Cas.
143.

A N

I N D E X

O F T H E

P R I N C I P A L M A T T E R S :

A

Abatement.

IF an action is brought against one partner without joining the others, it must be pleaded in abatement

page 118

If two are bound jointly in a bond, and one only is sued, he should plead that matter in abatement 246

How such matter should be pleaded *ib.*

If a bond is made to several, and all do not join in the action, it must be pleaded in abatement 247

If a person is sued as executor, he may plead in abatement that he was administrator 256

If a covenant is joint, and all do not join in the action, it must be pleaded in abatement 304

That the goods are the property of a stranger is a good plea in abatement in an action of replevin 351

How to plead such matter *ib.*

In actions of trespass, joint-tenancy or tenancy in common must be pleaded in abatement 411

If one owner only of a ship is sued, he must plead that matter in abatement 623

Abuttal.

If the plaintiff in trespass sets out the abuttals of his close, he must prove them as laid 417

Accord and Satisfaction.

How to be pleaded in an action of assumpsit 147

What payment shall amount to it *ib.*

What satisfaction only is good *ib.*

How it is to be pleaded to an action of debt 229

What qualities a good plea to this effect should have 230

How it is to be pleaded to an action of covenant 308

Accord and satisfaction is a good plea in trespass 415

The plea should shew how it was done

page 415

So it is a good plea in ejectment 454

So it is a good plea in slander 519

Account.

Under articles to account, assumpsit will not lie 96

Aliter on a promise to account *ib.*

How such promise must be laid *ib.*

Where an account is balanced, and struck on the dissolution of a partnership, assumpsit will lie 97

Count in assumpsit on an account, must always be exhibited as stated 141

The court will not admit evidence of an unliquidated account *ib.*

What accounts current among merchants are barred by the statute of limitations 148

Action.

Where a right cannot be completely tried in any particular form of action, it shall not lie 97

Where different matters are to be performed at different times, when an action may be commenced 129

Demands due in different rights cannot be joined in the same action 138

Administrator.

Money received under a void administration, recoverable in assumpsit 3

In what case not recoverable *ib.*

Administrator may indorse a note or bill of exchange 29

And they may be indorsed to him *ib.*

If an administration has been granted in a wrong diocese, how it is to be pleaded 167

Where the intestate has been resident at different times in different dioceses, how administration is to be granted *ib.*

Debt will not lie against an administrator on a simple contract 173

The ordinary may authorise a creditor

- to sue on the administration bond
page 200
- How an administrator is to be declared
against in general 217
- How chargeable in debt on a lease *ib.*
- Cannot sue till administration has been
granted 218
- How he should declare in debt *ib.*
- Where actions against him are to be
laid 217
- In what cases the declaration should be
in the debt and detinet 218
- What matters the declaration by an
administrator should state *ib.*
- May retain for his own debt 248
- How to take advantage of a retainer
249
- If a defendant, sued as administrator,
pleads a retainer of a debt due to
himself, he need not plead that the
debt was a just and true one 250
- How he is to dispose of the intestate's
effects 251
- How payments are to be pleaded 253
- How administration is to be granted
where there are *bona notabilia* in dif-
ferent dioceses 255
- What administrations are void, and what
voidable *ib.*
- Administration *durante minore etate* of
an executor or administrator, how
long it shall last *ib.*
- How far the inventory exhibited by an
administrator is evidence 260
- What is admitted under *plene admini-
stravit* 261
- Where an administration has been re-
pealed, what payments are good 262
- On what covenants an action will lie
against an administrator 290, 296
- On what estates 296
- Administrator *pendente lite* may main-
tain ejectment 439
- How an administrator may declare in
ejectment 449
- If letters of administration are lost, how
they may be supplied in evidence 488
- Under what circumstances he can sue
out a commission of bankrupt 564
- May maintain trover for a taking in
his own time, or in intestate's life-
time 578
- If an administration is repealed, the first
administrator is not liable in trover
for the goods he disposed of while
his administration continued *ib.*
- If a person before administration is
granted to him permit another to
take goods of the intestate, he cannot
maintain trover for these goods after
administration granted page 578
- Trover will not lie against an admini-
strator for a conversion of goods by
his intestate in his lifetime 587
- How he may declare in trover 589
- What defendant may give in evidence
to trover by an administrator 596
- Admiralty.*
- Questions of prize belong exclusively
to the courts of admiralty, and the
courts will not grant a prohibition
for any matters connected with prize
401
- Adultery.*
- In an action for adultery the marriage
must be proved 342
- What shall be proof sufficient of the
marriage *ib.*
- The church register is sufficient proof
of the marriage 343
- The marriage need not be according
to the ceremonies of the church of
England *ib.*
- A copy of the register of a foreign
chapel not evidence *ib.*
- Confession of the wife no proof of the
fact *ib.*
- What circumstances operate to increase
the damages *ib.*
- What to diminish them *ib.*
- What defendant may give in evidence
to diminish the damages 344
- If an husband suffers his wife to live in
open prostitution, no action of adul-
tery will lie *ib.*
- To actions of adultery not guilty within
six years is the proper plea 345
- Though the damages are under 40s.
plaintiff shall have his full costs *ib.*
- Advowson.*
- Purchase of an advowson not simony
180
- Affidavit.*
- The affidavit of a person convicted of
crimes may be read in his own de-
fence 725
- How far affidavits are evidence 739
- How given in evidence *ib.*
- Affidavits of illiterate persons, how to
be sworn 740
- Voluntary affidavits, how they differ as
evidence from an answer in chancery
753
- Agent.*

Agent.

- Army agent, how far liable on a bill drawn by an officer *page* 26
 An action for money had and received will not lie against an agent for money voluntarily paid to him for the use of his principal 109
 How far the principal shall be bound by the act of his agent *ib.*
 The right of the principal shall not be tried in an action against the agent 110
 Where money has been paid to an agent by mistake, in what cases he shall be liable, in what not *ib.*
 An action on the case will lie against a person who undertakes to do any thing for another, though the agent derives no benefit from it, nor is paid for his trouble 634

Agreements.

- Agreements obtained by coercion, or which are a fraud on others, are void 97
 What agreements requiring a note in writing are good within the statute of frauds 99
 No person can maintain assumpsit on agreement to which he is not a party 105
 Agreements to be performed at different times when suable 129
 If there is a special agreement, it ought to be declared on 130
 The agreement should be proved expressly as laid 138
 Agreements in the alternative how to be declared on 139
 If plaintiff declares on a special agreement and fails in proving it, he may go into evidence on the general counts 140
 Words importing an agreement will support an action of covenant 267
 A recital of an agreement shall support an action of covenant 268
 Agreements must be stamped 777
 Exception in cases of sales, or between merchants 778

*Vid. Sales and Marriage.**Alia Enormia. Vid. Evidence.**Alien.*

- The wife of an alien enemy, or of one who has abjured the realm, is chargeable as a feme sole 127

- That the plaintiff is an alien enemy is a good plea in assumpsit *page* 166
 Alien cannot maintain an ejectment 439
 What children born abroad may inherit *ib.*

Amends.

- The defendant may plead tender of amends in an action of trespass, where the trespass was involuntary 416

Amercement.

- In what cases debt lies for an amercement 197
 In debt on an amercement any variance in stating the amercement is fatal 213
 What variances are fatal 260
 How to declare in debt for an amercement 238
 How to be made in courts leet and baron 364
 An amercement cannot be for a private injury done to the lord, even though warranted by custom *ib.*
 An avowry for an amercement should state that the party was guilty *ib.*
 In cases of court leet or baron the steward amerces generally, and it is then assented 365
 The amercement cannot be by the jury *ib.*
 In avowry for an amercement, a complete title as to the jurisdiction of the court and extent of the manor ought to be shewn *ib.*
 How the taking for an amercement is to be justified (*Vid. Fine.*) 412

Ancient Demesne.

- Tenants by ancient demesne are excused from payment of tolls for the produce of their lands 368
 That lands are ancient desmene, how to be pleaded in ejectment 454

Annuity.

- Money paid for an annuity which becomes afterwards void, is recoverable in assumpsit 2
 But it is not recoverable against the surety for the payment of the annuity *ib.*
 Grant of annuity is not usurious 178
Aliter if colourable only to hide a real loan *ib.*

- Set-off may be pleaded to one annuity bond *page* 241
Answer.
- In chancery, in what cases it is good evidence 768
- Apportionments. Vid. Insurance.*
- Apprentice.*
- Assignee of an apprentice cannot sue on the covenant 294
- Arrests.*
- Money promised to a bailiff to let a party arrested to bail, is not recoverable in assumpsit 90, 92
- Bonds given by persons under arrest, in what cases void 185
- What arrest will justify a battery 314
- What arrests are illegal, with reference to the person 326
- Arrest of an executor or administrator is illegal 327
- Of arrests of a witness *ib.*
- Of peers, certificated persons, or bankrupts *ib.*
- Of husband and wife *ib.*
- Of arrests on a Sunday *ib.*
- Of arrests of wrong persons 328
- Of illegal arrests with reference to the process *ib.*
- Of arrests on charge only *ib.*
- Of arrests on void process 329
- On irregular process *ib.*
- What process is irregular *ib.*
- Of arrests with reference to the court or magistrate who issued the process 330
- When the court has no jurisdiction, or exceeds it *ib.*
- Of arrests by warrant of commissioners of bankrupt *ib.*
- Of arrests when the court has power but the proceedings are irregular *ib.*
- An arrest under a bye-law is illegal 333
- When the plaintiff orders the sheriff to discharge a prisoner, or a superedeas comes, the detention is illegal *ib.*
- What arrests are legal 334
- Arrest of a felon by a private person, good *ib.*
- Bare words will not make an arrest, without touching the body 604
- The arrest must be made by the authority of the bailiff *ib.*
- It must be by virtue of a warrant signed and sealed by the sheriff *page* 604
- How an arrest is to be made *ib.*
- The bailiff need not shew his warrant unless so required *ib.*
- In what cases doors may be broken to make an arrest *ib.*
- What shall be deemed an outer door *ib.*
- If a person illegally arrested be while in custody charged with a fair arrest, it shall be good and valid 605
- Arrests on a Sunday are void *ib.*
- False imprisonment will lie for an arrest on a Sunday *ib.*
- What arrests on that day may be good *ib.*
- The writ should be of the proper county *ib.*
- Delivering a writ to a sheriff against a person when in custody is a good arrest *ib.*
- Vide Escape and Sheriff.*
- Affault.*
- What shall constitute an assault in law 312
- How it differs from a battery *ib.*
- The act need not be immediate 313
- But must be wilful *ib.*
- Must be done without the party's consent *ib.*
- What shall excuse an assault 314
- What are good justifications in assault 315
- Vid. Declaration, Pleading, Evidence, Verdict, Damages, and Costs.*
- Son assault demesne*, what is good evidence to support it 315
- Every assault will not justify every battery *ib.*
- What may be given in evidence under it 320
- Assets.*
- In declaring against an executor on a promise of testator's, it is not necessary to set out that the defendant has assets 138
- Payment of interest on a legacy by an executor proof of assets 142, 261
- Where an executor is chargeable though he has no assets 199
- How the heir is chargeable by reason of assets 216
- What pleading by an executor or administrator

ministrator is an admission of assets *page 254*
 How far a creditor shall be bound by judgment of assets *quando acciderint* 260
 If the jury find assets in *Ireland*, they shall be assets here 263
 The heir is chargeable with the assets at the time of his ancestor's death 247
Vid. Administrator, Executor, and Heir.

Assignee.

When and how far assignee of lessee is chargeable in debt for rent 201
 How far an executor or administrator may assign 202
 Where debt for rent is to be brought against an assignee 213
 How an assignee is to be declared against in debt for rent 220
 Assignee is bound by a covenant not to assign 276
 What covenants shall bind assignees 276, 290
 Who is liable as assignee 289
 Where assignees are not liable in covenant 290
 How far assignee is chargeable 291
 How far the assignee to be chargeable must be in possession 292—3
 Assignee of part liable in covenant 292
 What covenants shall not extend to assignees 293
 Under what covenants he may sue *ib.*
 Assignees of the reversion under stat. 32 H. 8. c. 34. what actions they may maintain *ib.*
 How breach of covenant is to be assigned where an act is to be done by or to assignee 302

*Vid. Bankrupt.**Assignment.*

Covenant not to assign, what shall be a breach 276
 What is a waiver of a breach of this covenant 277
 In case of bankruptcy, how proved 565
 Where there has been an assignment of a deed, it is sufficient to prove the assignment without proving the original deed. 773

Assumpsit

Lies on contracts either express or implied 2

As to implied contracts, it lies to recover money paid under a mistake, or through deceit *page 2*

But to this is the exception of payment of money into court, which cannot be recovered back, though it may have been wrongfully paid *ib.*
 — to recover money paid for a consideration which happens to fail *ib.*
 — to recover money paid to one acting under a void authority 3
 — to recover money obtained by extortion, imposition, or oppression 4
 — to recover money embezzled, or which a person has been defrauded of by cheating, even from a third person, if such person got it *mala fide* 5
 — to recover money ordered to be paid under an erroneous judgment, or under the judgment of a court where the merits could not be tried 6
 — to recover money paid under an illegal contract, unless the party suing be a *particeps criminis* *ib.*

And even in that case he shall recover, if he was ignorantly engaged in the illegal transaction through the imposition of another 7. 91

Lies to recover money under a by-law 7

— to recover an assessment imposed on the subject, under a power given by law *ib.*

— to recover tolls *ib.*

— to recover petit customs *ib.*

— to recover fees of office, provided they be settled fees, not mere gratuities 8

Wherever the law has imposed any duty on a person, and given him certain allowances or charges for it, assumpsit lies to recover such charges 10

Vid. Attorney, Sales, Wagers, Use and Occupation, Bills, Insurance, Auction, Contract

When express dissent appears, the law will not raise an implied contract to support assumpsit 86

A party cannot by his own act raise an assumpsit 87

Assumpsit will not lie on a voluntary courtesy *ib.*

What shall be deemed a voluntary courtesy 88

Assumpsit will not lie on an illegal transaction *ib.*

Even

- Even though the party bringing the action has not been concerned in it *page* 90
- But if the transaction has not been in itself unlawful, a subsequent illegal use of the subject will not destroy the assumpsit 91
- Assumpsit will not lie to recover money for doing an act which the party should have done without reward 92
- Nor where the demand arises from a fraudulent transaction 93
- Nor where it is founded on an unconscientious demand 94
- Nor where the consideration is frivolous or groundless *ib.*
- Nor where the debt is due by specialty 96
- Nor where the agreement on which it is founded has been obtained by coercion, or is a fraud on others 97
- Nor will it lie in the courts above to recover costs ordered to be paid by a rule of an inferior court 93
- Nor to recover money paid voluntarily, or in consequence of an action brought with knowledge that the demand was unlawful, and paid with a reservation of the party's right *ib.*
- Money paid on a consideration bad in law, yet is not recoverable back again in assumpsit *ib.*
- Assumpsit will not lie where it will not completely try the question *ib.*
- No person can maintain assumpsit on an agreement to which he is not a party 105
- In assumpsit against an executor or administrator, and *plene administravit* pleaded, plaintiff must prove his debt 261
- Vid. Declaration and Pleading.*
- If the sheriff pays the debt of a defendant who has escaped, he may maintain assumpsit against him for it 612
- Assurance.*
- Covenant for further assurance, how it is to be made 278
- Attachment.*
- Foreign attachment is a good plea in assumpsit 165
- What in such case must be proved 166
- What debts can be attached by foreign attachment 231
- How foreign attachment is to be pleaded to an action of debt *page* 232
- Plaintiff in the action should have notice *ib.*
- What attachment of the goods of a trader is an act of bankruptcy 556
- Foreign attachment in case of bankruptcy 574
- Attorney.*
- Money received under a forged power of attorney recoverable back 3
- Fees of an attorney recoverable in assumpsit 8
- Must furnish a bill under the stat. 3 *Ja. 1. c. 7. and 2 G. 2. c. 23. § 23. ib.*
- And the court will stay proceedings till the attorney has delivered a bill, signed *ib.*
- But not unless some of the business has been done in the court where the action is brought 9
- The bill must be left with the client a month before the attorney can sue upon it 8
- But where an action is brought against an attorney, and he pleads a set-off of his bill, he may give it in evidence, though it has not been delivered a month, provided the plaintiff has had time to have it taxed *ib.*
- And a bill must be delivered, though all the business has been done at the quarter sessions 9
- But the statute does not extend to conveyancing, or to the executors of attorneys *ib.*
- Nor to business done as an agent *ib.*
- And where the defendant is an attorney when the action is brought, but was not one when the business was done, the plaintiff need not deliver a bill pursuant to the statute *ib.*
- Where a party has not taxed an attorney's bill, but drives him to an action, he shall not be allowed to question the reasonableness of the items before a jury *ib.*
- Neither shall he be put to prove the several items before a jury, for that is a matter only to be done on taxation *ib.*
- But the attorney must shew the existence of the causes, and the businesses for which the charges were, and prove the main articles 10
- And the stat. 2 G. 2. is to be taken so strictly, that a bill must be delivered when-

whenever there has been a cause, even though the attorney merely charges the costs out of pocket *page 10*
The statute of limitations runs against demands of attorneys for their fees 148

An attorney cannot maintain an action of debt for business done for a third person 173

The court will not allow a whole judgment to be set off without securing the attorney's bill 241

How an attorney should make a lease in the name of his principal 259

May be liable to an action for false imprisonment, together with his client 405

In an action by an attorney for words, it is sufficient that he has practised as such 521

Is liable to an action on the case for neglecting the suit of his client 617

By what the damages in such case shall be regulated *ib.*

The court will not interpose in a summary way *ib.*

Any person injured by an attorney in conducting an adversary suit, may maintain case for the injury 618

In declaring against an attorney for negligence, misrecital of the writ on which the first writ was grounded is fatal 652

How far attorneys are permitted to give evidence against their client 717

Avowry.

How an avowry differs from a confession 354

Defendant may avow generally without naming any tenant, by stat. 21 H. 8. c. 19. *ib.*

How avowries are to be made under the statute *ib.*

How far particular estates are to be shewn 355

Statute extends to all cases of avowry *ib.*

All rents may now be avowed for *ib.*

Avowry for a *nomine pænæ* must shew a demand 356

Avowry for part of the rent should shew how the rest was satisfied *ib.*

Avowry for more than is due not bad *ib.*

Persons not solely seised, how they must avow, as coparceners, &c. *gr.* 357

Defendants may avow generally that plaintiff held under a certain article without setting out landlord or lessee's title or tenure, by stat. 11 G. 2. c. 19. *page 358*

If defendant avows under the statute, *nil habuit in tenementis* is a bad replication *ib.*

Copyhold cases not within the stat. *ib.*

Executors and administrators of tenant in fee-tail or for life, may distrain by stat. 32 H. 8. c. 37. *ib.*

Constructions on this statute *ib.*

They may distrain for arrears on leases for years 359

Defendant may have judgment in replevin, though he misrecites his title 360

How to avow for a taking for damage feasant to a common where the number of cattle is certain or uncertain *ib.*

What the avowry for an amercement should set out 364

How such avowry should state the right, &c. to amerce *ib.*

Several persons cannot join in an avowry 374

Except coparceners and joint-tenants, who may join, but not tenants in common *ib.*

If the plaintiff in avowry for rents, customs, services, &c. is barred, the defendant shall have costs and damages, stat. 21 H. 8. c. 19. 375

If the plaintiff is nonsuited before issue joined, the defendant may recover the rent arrear by writ of inquiry, by stat. 17 Car. 2. c. 7. 376

But defendant need not proceed under the statute *ib.*

A writ of second deliverance shall supersede the proceedings under the statute *ib.*

If defendant is nonsuited after avowry, the jury who try the issue shall inquire of the rent arrear, value of the goods under stat. 17 Car. 2. 377

If the jury who try the cause neglect to assess damages, it cannot be done by writ of inquiry *ib.*

Statute does not extend to distresses for poor rates, damage feasant, &c. 378

Action

Auction and Auctioneer. Vid. Sale.

Auctioneer cannot vary the printed particular by any verbal declaration at the sale *page 12*

It is not material whether an auctioneer has paid over the money to his principal or not, for he is in the nature of a stakeholder *ib.*

Where the party sues for damages for non-performance of a contract, the action should be against the principal, unless the auctioneer refuses to disclose the name of the principal *ib.*

Goods sold by auction not within the statute of frauds *15*

The auctioneer is to be considered as the agent for the buyer as well as the seller *ib.*

Deposit at a sale by auction, how far it binds *ib.*

It is not necessary in all cases to pay the whole deposit required by the conditions of sale, but if any money has been paid, and accepted as such by the auctioneer, it is sufficient *ib.*

Where a deposit has been made, if the vendee does not perform his bargain, the deposit shall be forfeited *16*

If the owner of goods employ persons to puff at an auction, without declaring it, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the purchase *ib.*

Till a lot is knocked down, the bidder may retract *ib.*

In what cases an auctioneer is liable to an action in his own name *ib.*

Auctioneer may maintain an action in his own name for his goods sold *17*

Authority.

Money paid to any one acting under a void authority is recoverable, in assumpsit *3*

That authority not void where given by a court of competent jurisdiction *ib.*

When a person is acting under a legal authority, it shall excuse a battery *386*

Award.

That all matters were referred, and an award made, is a good plea *167*

In debt on an arbitration bond, the plaintiff should set out the award *209*

If an executor submits to an award, it is an admission of assets *254*

B*Bail.*

In what cases a party can be held to special bail *page 190*

For what sum the sheriff must take special bail *ib.*

In what manner the bail-bond must be given under 23 H. 6. *ib.*

The directions of the statute must be in every respect observed *ib.*

The undertaking for the appearance of defendant must be by bond with sureties *ib.*

Bond should be to the sheriff by his name of office *ib.*

Condition must be to appear at the return of the writ *ib.*

The substance of the return, without the exact words of the writ, is sufficient *191*

The statute only extends to mesne process *ib.*

The bail-bond must be founded on good and legal process *ib.*

How the bail-bond may be assigned under stat. 4 & 5 Ann. c. 16. *ib.*

Assignment should not be made till the four days expired *ib.*

When the assignment may be made *ib.*

Bond may be assigned in any county, and plaintiff may bring his action in the county where the assignment was made, or where the party was arrested *192*

Action on the bond can only be brought in the court where the bail was given *ib.*

Who only can make the assignment, and when the action must be brought *ib.*

How bail above is to be put in Proceedings on the recognizance is either by debt or *scire facias* *193*

Plaintiff cannot proceed against the bail till *non est inventus* returned on the *ca. sa.* *ib.*

When the bail can surrender their principal *194*

Bail shall have eight clear days to surrender their principal after the return of the writ *ib.*

When plaintiff proceeds by *scire facias* the bail shall have to the return of the second *sci. fa.* to surrender the principal *ib.*

But

But this is matter of favour page 194
In what cases the bail shall be discharged *ib.*

In what manner the bail must surrender, in order to discharge their principal *ib.*

Bail not discharged by defendant's having judgment in the court below 195

If error is brought, how far the bail shall be discharged 195—6

Proceedings stayed against bail, pending a writ of error 195

But the application must be made by the bail before judgment against them on the *sci. fa.* *ib.*

Or before the return of the second *sci. fa.* *ib.*

Bail may justify breaking open an inner door, if the outer door is open, in order to search for the principal, for the purpose of surrendering him 416

To debt on the bail-bond, what defendant can plead 237

Cannot traverse the arrest of the principal *ib.*

How far the bail are liable in debt 265

In actions of assault, defendant may be held to special bail 321

Bailiff.

Promise made to a bailiff to pay the debt on condition of his letting the party go at large, is void 90

Assumpsit will not lie on a promise of money for doing what was his duty without any reward 92

If the defendant in replevin make confuance as bailiff to *J. S.* plaintiff may traverse that fact 373

Vid. Liberty.

Bailment.

What are the different species of bailment 618

In case of a naked bailment without profit to bailee, he is only chargeable in case of gross neglect *ib.*

Vid. Carrier and Innkeeper.

If goods are bailed for the purpose of trading or acting by commission without profit to bailee, he is chargeable, in case of loss, only for neglect 425

If things are lent to any person, he must use them for the purposes only for which they were lent, or he is liable page 425

Bankrupt.

Money given to a creditor to induce him to sign the bankrupt's certificate, is recoverable in assumpsit 5

Bankrupt may after his bankruptcy indorse a bill of exchange, given before it for a valuable consideration 30

What action the assignees may maintain in their own names 119

A legacy or other property coming to a bankrupt before the allowance of his certificate by the chancellor, belongs to his assignees *ib.*

Money levied by *fi. fa.* on the goods of a bankrupt after an act of bankruptcy committed, is recoverable in assumpsit *ib.*

All dispositions of property made after an act of bankruptcy are void, except money paid in the fair and usual course of trade, and to a person who had no notice of the act of bankruptcy *ib.*

The assignees may recover money lost at play before the bankruptcy *ib.*

What payments made to a bankrupt after a secret act of bankruptcy are protected by stat. 1 *Jac. I. c. 15.* *ib.*

What payments by a bankrupt after a secret act of bankruptcy are good under stat. 19 *G. 2.* 120

Assumpsit will lie against assignees under an order for a dividend 121

Assumpsit will lie against the bankrupt himself where the debt is not provable under the commission, though the cause of action preceded the act of bankruptcy *ib.*

Or if he makes himself liable by a new promise *ib.*

An uncertificated bankrupt may maintain an action for work and labour, and materials *ib.*

And for money lent *ib.*

But he cannot maintain an action for the allowance given by the statute *ib.*

How assignees are to declare in assumpsit 137

Bankruptcy in the plaintiff, how to be pleaded 156

A bank-

- A bankrupt may maintain assumpsit for what he earns after his bankruptcy *page* 157
- That the defendant has become a bankrupt, how to be pleaded *ib.*
- To what debts the certificate is a bar *ib.*
- Bankrupt may bind himself by a new promise before his certificate obtained, which shall be good 158
- What promise shall bind him *ib.*
- A certificate under a joint commission discharges a separate debt *ib.*
- In what cases a bankrupt shall be discharged in case of a second commission *ib.*
- How a bankrupt shall be relieved, when he becomes so pending the action 159
- Covenants in a lease not discharged by a bankruptcy 379
- How debts are to be set off against actions by the assignees 241
- Bond given by a bankrupt after an act of bankruptcy committed, not discharged by his certificate 246
- Bankrupt is liable in covenant for rent accruing after his bankruptcy 291
- Covenant to repair, pay rent, &c. not discharged by the bankruptcy 309
- The commissioners of bankrupt are liable to an action for false imprisonment, for committing the bankrupt, in what cases 331
- If the goods of a trader are taken in execution, but before they are sold he becomes a bankrupt, they belong to the assignees 392
- Trespass lies by a person against whom a commission of bankrupt has been sued out, he not being an object of the bankrupt laws against the assignees for taking his goods 398
- Assignees of a bankrupt estate cannot maintain ejectment for the bankrupt's estate before inrolment of the deed of assignment 431
- But the assignment shall only operate on such lands as were in the bankrupt's possession at the time of the assignment 437
- Lands purchased during the bankruptcy, or which shall come to him by descent or purchase, must be conveyed by a new deed to the assignees *ib.*
- What effect a sale by the commissioners shall have on lands of which the bankrupt is seised in tail 438
- Sale by the commissioners of an estate-tail of bankrupt equivalent to suffering a recovery *page* 438
- Who are traders within the statutes of bankrupt 345
- There must be a buying as well as a selling 546
- Handicraft, or mere working trades, not within the bankrupt laws *ib.*
- The trade need not be lawful 347
- Persons using trade, whatever other profession they may be of, may become bankrupts *ib.*
- How far the drawing and re-drawing bills of exchange shall make a man an object of the bankrupt law 547
- The buying and selling must be general 548
- Vid. Innkeeper, Viſualler, and Farmer.*
- A person residing abroad, but trading here, may be made a bankrupt 551
- What departing from the realm shall be held an act of bankruptcy 552
- What remaining abroad is so *ib.*
- How far being denied to a creditor is an act of bankruptcy *ib.*
- How far a denial by agreement is an act of bankruptcy 553
- The denial must be to a creditor *ib.*
- And the debt must be actually due 554
- A banker's stopping payment is not an act of bankruptcy *ib.*
- What departing from the dwelling-house is an act of bankruptcy *ib.*
- It must be to avoid payment of a debt *ib.*
- Must be voluntary 555
- What arrest and lying in prison for two months is an act of bankruptcy *ib.*
- From the time of the surrender only the person shall be a bankrupt *ib.*
- What escaping from an arrest or being outlawed is an act of bankruptcy *ib.*
- What fraudulent procuring of his goods and chattels to be sequestered or attached is an act of bankruptcy 556
- What outlawries are acts of bankruptcy 557
- What to yield himself to prison *ib.*
- What fraudulent grant or conveyance is an act of bankruptcy *ib.*
- The assignment must not be of a trader's whole stock in trade 558
- An assignment for the purpose of defrauding any of the creditors, is an act of bankruptcy, and void *ib.*
- What

- What assignments a trader may make *page* 559
- What payments to the petitioning creditor are acts of bankruptcy 560
- How far obtaining a protection is an act of bankruptcy *ib.*
- What is an act of bankruptcy by a trader having privilege of parliament *ib.*
- A plain act of bankruptcy cannot be purged 561
- What are good petitioning creditors' debts under stat. 5 G. 2. c. 30. *ib.*
- The petitioning creditor's debt must be a legal one, and for which an action would lie 562
- The debt must be due at the time of the act of bankruptcy committed 563
- Need not be contracted during the trading 564
- What are good petitioning creditors' debts *ib.*
- Notes bought in at ten shillings in the pound are good petitioning creditors' debts *ib.*
- A commission may issue against one partner for a partnership debt 565
- Executor of a bankrupt cannot sue out a commission of bankrupt against another *ib.*
- How the issuing of the commission and the assignment is to be proved *ib.*
- Whatever is in the bankrupt's possession when he becomes so, is liable to his bankruptcy, by stat. 21 Jac. 1. c. 19. *ib.*
- If mortgagee of a trader's effects suffers him to remain in possession, he loses the benefit of his mortgage 566
- The statute does not extend to assignment of ships at sea *ib.*
- Nor to cases where he has only the temporary possession *ib.*
- Nor to cases in which he has not the order and disposition 567
- Vendee or mortgagee must take possession when in his power 568
- Goods in the hands of an executor or administrator bankrupt do not belong to his assignees 571
- Goods the property of the wife, and vested in trustees, do not belong to the husband's assignees 572
- Extends to cases where the bankrupt is in possession of the goods of strangers 579
- Except in the case of goldsmiths or factors *page* 570
- Mere possession unconnected with other circumstances is not sufficient 571
- The assignment has relation to the act of bankruptcy 573
- It makes no difference whether the property is in England or elsewhere *ib.*
- If an extent issues before an act of bankruptcy, but the liberate not executed, it shall bind the goods of the bankrupt 574
- The king is not bound by the statutes of bankruptcy, but only by the actual assignment *ib.*
- Neither the bankrupt nor his wife can be a witness to prove an act of bankruptcy committed, or any fact to support the commission 592
- But he is an admissible witness to *explain* an act which may or may not be an act of bankruptcy 591
- Confession by a bankrupt to a third person of his having committed an act of bankruptcy, good evidence *ib.*
- A creditor who has sold his chance of recovering his debt under the commission, is a good witness to prove the petitioning creditor's debt 592
- So a creditor who releases to the assignees is a good witness to prove an act of bankruptcy 591
- The record of the depositions taken before the commissioners, is good evidence as to acts of bankruptcy *ib.*
- General proof of absconding sufficient without shewing any writ issued *ib.*
- What evidence necessary to prove the petitioning creditor's debt under a commission *ib.*
- What evidence shall be sufficient as against the bankrupt himself 592
- An action on the case lies for maliciously suing out a commission of bankruptcy 628

Baron and Feme.

- Feme covert cannot indorse a note or bill of exchange 29
- The husband liable for the debts of his wife *dum sola* 112
- Husband always liable for necessaries furnished to the wife during cohabitation, unless furnished under illegal circumstances *ib.*
- Not

- Not liable where he forbids tradesmen from trusting her *page* 123
- Wife cannot borrow money even to pay for necessaries 122-3
- If the wife pawn clothes before they are worn, baron not liable 123
- A delivery of any thing to the wife at baron's request, is a delivery to him *ib.*
- What shall be deemed necessaries 122. 124
- If the husband turns the wife away, he is liable for necessaries furnished to her *ib.*
- A man suffering a woman who lives with him to assume his name, shall be charged as if she was his wife *ib.*
- If the wife elopes, the husband shall not be chargeable 125
- Neither shall she herself *ib.*
- If the wife has a separate maintenance, she shall be chargeable for her own debts 126
- What separate maintenance shall discharge him 126, 127
- In what cases a woman may be charged as sole 127
- How the husband shall sue for money due to the wife *ib.*
- Where she may join *ib.*
- How far he has the benefit of her contracts *ib.*
- In what cases a wife may be a witness against her husband 143
- How far husband and wife are chargeable in debt for rent 200
- How to be charged in debt on a bond made before marriage to the wife 219
- A bond given by baron before marriage, in contemplation of marriage, and as a provision for her benefit, is not extinguished by marriage 200
- Baron may bring an action in his own name, on a bond to him and his wife *ib.*
- How a feme covert may sue by the custom of *London* *ib.*
- For what things of the wife the husband may sue alone *ib.*
- Though the wife is under age, the husband and wife may appear by attorney *ib.*
- How husband and wife should join in covenant for rent of the wife's land under stat. 32 H. 8. c. 28. 296
- Where the husband may sue alone *ib.*
- A man may justify an assault in defence of the wife, and the wife in defence of her husband *page* 314
- For a battery of the wife, how the action is to be brought 316
- How the wife is to plead a justification in defence of her husband 318
- How the husband may plead *ib.*
- What in such case is good evidence 321
- In actions for debts of the wife before or during coverture, how husband and wife are to be arrested 327
- Baron and feme shall join in trover for goods which were the property of feme before marriage, though the conversion has been after 575
- Trover will lie against baron and feme for a conversion by feme before coverture, or by her after 587
- Vid. Witness. London.*
- Husband seised in right of wife, may distrain 358
- Husband alone may replevy and avow for cattle taken before marriage, which belong to the wife 375
- For rent due to the husband and wife, the husband alone may avow *ib.*
- Husbands seised in right of their wives holding over after the determination of their estates are trespassers *ib.*
- In what cases they shall join in an action of trespass 434
- Wife cannot give permission to take the goods of her husband 413
- If the husband discontinues lands of the wife, she or her heirs may have an action of ejectment after his death *ib.*
- If the wife aliens land which comes from the husband, his heir may after her death maintain ejectment for them 431
- How baron and feme should declare in ejectment 449
- How far feme covert may devise 476
- Feme covert having a separate maintenance may be a bankrupt 551
- A feme sole trader who commits an act of bankruptcy, cannot be made a bankrupt after she marries *ib.*
- Cannot be witnesses for or against each other 719
- A feme covert trading separately may, by the custom of *London*, be a bankrupt 551
- Baron

- Baron and feme may join in trover for goods which were the wife's before marriage *page* 579
- Trover will lie against both for a conversion by the wife 587
- How to declare against them in trover 588
- Vid. Declaration.*
- How far evidence for or against each other 721
- Bargain and Sale.*
- All assignments by bargain and sale must be inrolled within six months 431
- Bastard.*
- Vid. Marriage.*
- If the marriage is not rightly celebrated according to the marriage act 26 G. 2. c. 33. it is void, and the issue bastards 481
- The inability of the husband may be good evidence to bastardize the issue 483
- Though a man has been divorced *causa frigiditatis*, if he marries again, and has issue, they shall not be bastards *ib.*
- Proof of want of access shall bastardize the issue *ib.*
- A child may be proved a bastard by other evidence than mere non-access of a husband 484
- If a divorce *a mensa et thoro* takes place, the children born during that period shall be held to be bastards *ib.*
- The wife shall not be admitted as a witness to prove want of access, and so bastardize the issue 485
- How long the issue may be born after the death of the husband to be held legitimate *ib.*
- Parents may bastardize their issue born before marriage, but not those born after 486
- Bill in Chancery.*
- Vid. Evidence.*
- If filed before six years expired, shall prevent the statute of limitations 153
- Bills of Exchange and Promissory Notes.*
- What notes are of a negotiable nature 23
- Vol. II,
- In order to be negotiable, a promissory note must be for the payment of money absolutely, and not depend on a contingency *page* 23
- Must not be in the alternative *ib.*
- Must be for the payment of money only 24
- No express form of words necessary, provided it amounts to a promise to pay *ib.*
- Need not have the words "or order" *ib.*
- All promissory notes for less than 20 s. are void 28
- How far promissory notes for more than 20 s. and for and under 5 l. are good *ib.*
- Need not express to be for value received 24
- What bills of exchange are of a negotiable nature *ib.*
- In order to be negotiable, a bill of exchange must be for the payment of money absolutely *ib.*
- Must not depend for payment on any particular fund (unless that fund is certain) or any particular event or contingency 25
- Must depend on the personal credit of the parties *ib.*
- Must be payable to order or bearer 26
- Must not be drawn for any particular purpose, or directed to be applied to any particular fund *ib.*
- Need not express to be for value received *ib.*
- What bills of exchange are void 27
- If made by a feme covert *ib.*
- If given for an usurious consideration *ib.*
- If given for money won at gaming, or lent to game with 28
- If for a less sum than 20 s. *ib.*
- How far bills of exchange for more than 20 s. and for and under 5 l. are good *ib.*
- A bill of exchange void in its creation can never be set up by any subsequent promise 27
- A bill of exchange given for an usurious consideration is void, even in the hands even of a *bonâ fide* indorsee 28
- But if good in its creation, usury in any intermediate transaction will not vitiate it *ib.*
- Any

- Any alteration of a bill of exchange in a material part, shall avoid it *page 28*
- How bills of exchange or notes are negotiated *29*
- Who may indorse bills or notes *ib.*
- The payee of a bill of exchange or note must be the first indorser *ib.*
- A feme covert cannot indorse a bill or note, though made to her when sole *ib.*
- An executor or administrator may indorse a bill or note *ib.*
- If a bill or note is made payable to two, both should indorse it, unless they are partners *ib.*
- A bill of exchange delivered for a valuable consideration before a bankruptcy, may be indorsed by the bankrupt after *30*
- In what case a bankrupt may indorse a bill of exchange *ib.*
- In what manner the indorsement is to be made *ib.*
- Effect of indorsement in blank *ib.*
- No bill or note can be indorsed for part of the sum *31*
- Bill of exchange or promissory note cannot regularly be indorsed over after the time it is due *32*
- How bills of exchange and promissory notes under 5*l.* are to be indorsed *33*
- Of the nature and effect of indorsement *ib.*
- Effect where the indorsement is to the person only, and when to order *ib.*
- The payee only can restrain the negotiability of a bill *ib.*
- In what order the several parties on a bill or note are chargeable *34*
- How the indorsee must sue *35*
- What he must prove at the trial *ib.*
- Bills payable to fictitious payee when recoverable *37*
- Bills or notes in what cases impeachable on the ground of illegality *ib.*
- No person chargeable through the medium of a bill of exchange, unless his name appears on it *38*
- Of bills of exchange or notes negotiable without indorsement *39*
- Bills payable to bearer recoverable under every circumstance *ib.*
- What the *bearer* of a bill of exchange must prove in an action in his own name *ib.*
- Payment of a bill which the owner had lost is good only when paid in the fair course of trade *page 40*
- Of the acceptance of bills of exchange *ib.*
- What is a good acceptance of a bill of exchange *41. 43*
- Acceptance must be in writing, in order to charge the drawer with costs and damages *ib.*
- What an absolute and what a conditional acceptance *42*
- The holder of a bill must take the acceptance to be absolute or conditional when the bill is tendered *41*
- Of the manner of acceptance *43*
- Who only can accept *ib.*
- Bill may be accepted in part *44*
- Or to pay half money and half in goods, &c. *ib.*
- Acceptance should be on the bill *45*
- But an agreement to accept before the bill is drawn will bind *ib.*
- Bill may be accepted at any time *ib.*
- How such acceptance is to be set out *ib.*
- Bill may be accepted payable at a longer date than stated in the body of the bill *46*
- How soon a bill payable at sight should be presented for acceptance *ib.*
- Of the effect of the acceptance, and how it is discharged *ib.*
- Acceptor never can aver the want of consideration *ib.*
- Acceptor liable to the drawer on his acceptance *ib.*
- Unless he accepts *for the honour* of the drawer, in which case he is not liable to the drawer *ib.*
- How an acceptance may be discharged *47*
- Acceptor of a bill of exchange only discharged by express words, or drawer's paying the bill *ib.*
- Discharge from the holder must be express *ib.*
- What shall amount to an express discharge *ib.*
- How the acceptance may be discharged *48, 49*
- Bill of exchange should not be paid till due *49*
- Of the protest of foreign and inland bills *ib.*
- In what cases the drawer is entitled to damages and costs against payee *50*
- Want

- Want of protest does not affect the right to recover the amount of the bill, but only goes to the damages and costs *page 50*
- How soon notice of non-acceptance or non-payment should be sent to the drawer or indorser *51*
- Where acceptance is refused of a bill of exchange, an action lies immediately against the drawer *ib.*
- When a bill ought to be protested *ib.*
- Notice to the drawer of the non-acceptance of an inland bill of exchange, where drawee has no effects of the drawer in his hands, not necessary *ib.*
- A subsequent promise by the drawer, where notice would be necessary, cures the want of it *52*
- Protest may be made on a copy where a new bill cannot be had from the drawer; but if a new bill can be got, protest on a copy will not be sufficient *ib.*
- Where the acceptor dies before the bill becomes due, protest should be made even before executors or administrators can be appointed *ib.*
- An acceptance by a third person *for the honour* of the drawee binds the person so accepting, and the protest should be against the drawee, not against the person who accepted it for his honour *53*
- Where a bill left for acceptance is lost, there must be two protests, unless the drawee gives a note for payment of the money in the bill *ib.*
- How the protest is to be made *ib.*
- When a bill is not to be protested *ib.*
- Protest not sufficient evidence without the bill *ib.*
- Protest of inland bills of exchange not necessary when they are payable after sight *ib.*
- Of the nature of payments by bills of exchange or promissory notes *54*
- Payment by bill of exchange is a good discharge of a debt, under stat. of 3 & 4 Ann. c. 9. *53*
- But if the bill or draft is fraudulent, as where there are no effects in the hands of the drawer, it is not a good payment *ib.*
- Cases of laches of the holders of bills and notes, in what cases liable *55*
- Drawer is not entitled to notice if he has no effects in drawee's hands *ib.*
- But an indorser of a bill or note is entitled to notice in all cases *page 55*
- When bills should be tendered for payment or acceptance *56*
- After laches in the holder, a promise to pay the bill by the indorsee or acceptor, is void, if he did not know of the laches *55*
- How circumstances may excuse notice *57, 58*
- What shall be good notice of non-payment *58*
- How far usage shall excuse the laches of the holder of the bill *59*
- Bills payable to the excise, have six days longer allowed than others *61*
- Bills payable to bearer, in what cases the loss shall fall on the holder *ib.*
- Of joint and several bills and notes, how they are suable *ib.*
- Money paid by a bankrupt on a bill of exchange after a secret act of bankruptcy, is good *119*
- In declaring on bills of exchange and notes, the day is material *136*
- How to declare against the acceptor of a bill of exchange *ib.*
- Statute of limitations a bar against bills of exchange *148*
- In writs of inquiry in actions on promissory notes, what is to be proved *180*
- In assumpsit on a joint note, one defendant may avail himself of a misnomer of the other *168*
- Judgment on bills of exchange and notes referred to a master *170*
- Debt will not lie against the acceptor of a bill of exchange *173*
- Note payable by instalments, when it may be sued *205*
- Bills of exchange which have some time to run, are discharged under the insolvent acts *245*
- Trover will lie for a bill of exchange *543*
- How far drawing and redrawing bills of exchange will make a man a trader within the bankrupt laws *547*

Bonds.

- A bond may be pleaded in bar to an action on simple contract *147*
- What bonds are good in law *173*
- What parties only can make a good bond *174*

- What shall be deemed dures, so as to avoid a bond *page* 174
- What bonds are void in their creation 175
- For usurious bonds, see *Usury*.
- For bonds given for sale of offices, see *Offices*.
- For simoniacal bonds, see *Simony*.
- What bonds are void for a consideration *malum in se* 182
- Bonds given as *præmia pudicitiae* are good in law *ib.*
- Vid. *Trade, Marriage, Evidence*.
- Bonds limiting the exercise of any legal powers, are void 185
- Bonds given for money lent to be applied to illegal uses are good *ib.*
- Aliter* if given for a debt arising from an illegal transaction between the parties themselves *ib.*
- Bonds conditioned for the performance of an agreement which is contrary to law are void *ib.*
- What bonds are good or void where the condition is impossible 186
- The extent of the bond as to persons or things limited to the condition 198
- Either heir or executor may be sued on a bond 199
- When money is to be paid on a bond at different times, when it can be sued 205
- An administrator is liable on the bond given to the ordinary 200
- In debt on simple contract, the plaintiff may recover less than he declares for 206
- How to declare in debt on simple contract *ib.*
- Declaration on a bond should state it to be by deed under seal 207
- Declaration on a bond should conclude with a profert *ib.*
- If the deed is lost, the plaintiff may declare specially *ib.*
- How a breach is to be assigned in debt on a bond *ib.*
- Where a particular breach need not be assigned 208
- Where a bond is payable by instalments, how the plaintiff may sue 210
- How a breach is to be assigned on a bond in the disjunctive *ib.*
- When a bond is dated at a certain place, it must be mentioned in the declaration *page* 210
- If the principal in a bond of indemnity does not pay at the day, the surety may, and recover against the principal, though the payment was without suit 211
- The court will not change the venue in debt, except under particular circumstances *ib.*
- How to declare on a bond against the obligor or his heir 216
- How the heir shall discharge himself *ib.*
- How an executor or administrator should declare against the heir 217
- How to declare against an executor or administrator *ib.*
- How they are to declare 218
- How to declare on a bond to a feme before marriage 219
- No parol averment varying the condition of the bond shall be admitted to be pleaded 221
- Aliter* if a matter in writing *ib.*
- How far delivery is essential to a bond so as to avoid it by pleading 222
- Defendant may plead that the nominal obligee of the bond is but trustee for another *ib.*
- So he may plead that the condition is contrary to law 223
- Under what circumstances the defendant may plead *non est factum* to a bond *ib.*
- How rasure or non-delivery shall avoid a bond 224
- How *solvit ad diem* is to be pleaded to debt on a bond 225
- How payment is to be pleaded under stat. 4 & 5 Ann. c. 16. *ib.*
- Tender and refusal cannot be pleaded under this statute *ib.*
- If no interest has been paid on a bond for 20 years, it shall be presumed to be satisfied 226
- This presumption is to be taken strictly against the obligor *ib.*
- How accord and satisfaction is to be pleaded to debt on a bond 229
- One bond is not pleadable in bar of another 230
- What pleas only are good to a bond of indemnity 232
- Bail

Bail bonds cannot be pleaded as a set-off against bonds for payment of money absolutely *page* 239
 Except when assigned to plaintiff *ib.*
 What shall amount to a release of a bond, and how it is to be pleaded 243
 Of joint and several bonds 245
 How the heir must plead *riens per descent* to debt on a bond 247
 In debt on a bond the subscribing witness must prove the execution 257
 What are the exceptions to this 258
 If a witness denies the execution of a bond, how it may be proved *ib.*
 How one may execute a bond for himself and his partner *ib.*
 Where a subscribing witness cannot be had or is incapacitated, collateral evidence is admissible *ib.*
 Where a fictitious name has been put as a subscribing witness, what shall be evidence *ib.*
 An admission before commissioners of bankrupt by a party of the execution of a deed, how far evidence *ib.*
 Where the witness is dead or becomes infamous, what shall be evidence *ib.*
 Or where he is incapacitated 259
 Where a witness is interested at the time of the attestation and also at the trial, he cannot be admitted himself, nor his hand-writing proved *ib.*
 How the execution of old deeds must be proved *ib.*
 In what bonds payment of principal, interest, and costs shall be good under stat. 4 & 5 Ann. c. 16. 264
 Bonds payable by instalments are within the stat. *ib.*
 Of bonds for performance of covenants 279
 Of assigning breaches on bonds for performing of covenants 281
 Difference of such bonds where the penalty is part of the agreement, and where it is only in *terrorem* *ib.*
 How breach is to be assigned on such bond under H. 8. g. W. 3. *ib.*
 Vid. Declaration and Pleading.
 How the sheriff is to take a replevin bond 348
 Trover will lie for a bond *ib.*
 An arbitration bond is a good petitioning creditor's debt whereon to ground a commission of bankruptcy *ib.*
 In trover for a bond the declaration need not set out the date *ib.*

Book.

Shop-book of a tradesman not evidence after the year *page* 141
 Where admissible *ib.*
 In what cases not admissible evidence 142
 Where a man may use his book of accounts in evidence *ib.*
 A man's own book of accounts not evidence for him 142
 Books of third persons how far evidence 774
 How far a man's own 775
 Daily book of the clerk of the papers of Newgate is good evidence 767

Breach.

The breach in the declaration should follow the undertaking 134

Broker.

A broker is to be considered as the agent for both buyer and seller 15
 In what cases he may have a set-off of goods the property of others 239, 240

Bridges.

In indictments for repairing bridges, the inhabitants of the county may be witnesses 712

Burglary.

Persons having the statute reward for apprehending burglars, may be witnesses *ib.*

Bye-law.

Penalties under bye-laws are recoverable in assumpsit 7
 A bye-law ordering imprisonment for non-payment of an assessment is contrary to *Magna Charta*, and an action of false imprisonment lies by a person imprisoned under it 416

Vid. Corporations.

C

Carrier.

May maintain trover for goods committed to him to carry 587
 If a carrier takes out part of what is committed to him to carry, it is a conversion of the whole 581
 Carriers are liable to all losses of goods, except such as arise from the act of God

- God, the king's enemies, or the neglect or the fault of the owner *p.* 619
 How far the act of God shall discharge a carrier *ib.* 620
 Who shall be deemed the king's enemies, so as to discharge the carrier 620
 How far the act of the owner of the goods themselves shall discharge the carrier 621
 He is liable in the case of every other loss *ib.*
 How far a carrier shall be charged by a general acceptance, and discharged by a special one *ib.*
 Carrier is only liable as far as he is paid 622
 Notice in the newspaper shall amount to a special acceptance *ib.*
 A delivery to a carrier's servant is a delivery to the carrier himself *ib.*
 A stage-coachman is not a carrier within the custom *ib.*
 For goods lost on board ship, the master or owners are liable 623
 Carriers are bound to deliver goods to the persons to whom directed *ib.*
 The persons must be carriers, and the loss happen in the way of the business *ib.*
 All persons carrying for hire are carriers within the custom 624
 Hackney-coachmen are not carriers *ib.*
 Neither is the post-master general *ib.*
 The declaration against a carrier for goods lost need not state the sum he was to receive for the carriage, but only that he was to receive reasonable hire 652
 In an action against a carrier, what the plaintiff must prove 658
 Verdict for a carrier evidence of the delivery of goods 738
- Case.*
- Trespass on the case, for what it lies 598
 Lies for any neglect or culpable omission *ib.*
 Lies against a person who undertakes the cure of any wound or malady and does it unskillfully 601
 Or for doing an act by which the health of another is injured *ib.*
 But in such a case there must be a duty on the party 599
 Folly and want of due care is a ground for this action *ib.*
- But where the action arises from the plaintiff's own neglect or folly, the action will not lie *page* 599
 For the depriving a person of a right which is common to all the king's subjects, an action will not lie without special injury 600
 Vid. *Sheriff, Justice of Peace, Attorney, Carrier, Innkeeper, Bailment, Escape, Rescue, Return, Common, Easement, Nuisance.*
- Certificate.*
- The judge may certify in actions against excise officers 398
 How the judge shall certify in cases of trespass 424
 Certificate of the commissioners for stating the army accounts, is good evidence 767
- Charitable Uses.*
- Bonds given to pay money for charitable uses on presentation to a living are not simoniacal 181
 Devises to charitable uses may be good as appointments 477
 What restrictions are put on devises to charitable uses by stat. 9 Geo. 2. c. 36. *ib.*
- Chancery.*
- Bill in chancery how far it is evidence, and of what 751
 How far the answer is 752
- Charter. Vid. Corporation.*
- Chose in Action.*
- Instruments conveying a chose in action may be recovered by trover 542
- Church and Churchwarden.*
- A churchwarden may maintain an action for money withholden from the parish 128
 May justify an assault for turning a disorderly person out of church 315
 Shall have double costs in actions against them which are discontinued, or the plaintiff is nonsuit 325
 May maintain trespass for taking goods of the church 403
 May proceed in a suit after their year is expired *ib.*
 Churchwardens, if they are elected by the parish, must shew a special custom 403
 Church-

Churchwardens and overseers of the poor shall have double costs in actions of trespass *page* 426
How an ejectment may be maintained for a church 428

Church-Yard.

San assault *demefne* is not a sufficient justification to an assault in a church-yard 316

Clerk.

Where a clerk had embezzled notes and money of his master's, they may be recovered where passed to another under an illegal transaction 6
Bond for his service how far recoverable 199

Commission

Of bankrupt, how proved at a trial at law 565

Commissioners.

Appointed by act of parliament to settle any claims, for the sums by them awarded to be due, assumpsit will lie 7
Commissioners to examine witnesses out of Chancery, may maintain assumpsit for their fees 8

Common.

A question on a right of common cannot be tried in an action of assumpsit for money paid on a supposed trespass on the common 98
In what cases a commoner may distrain the lord's cattle 361
In what cases those of another commoner *ib.*
And in what cases those of a stranger *ib.*
How prescription for cattle levant and couchant is to be pleaded *ib.*
Commoner must in his avowry shew a good and lawful prescription, and let out the whole of it 362
Commoner must prove the whole prescription as laid *ib.*
Where common lands are annually divided among the parishioners, each may maintain trespass for the part allotted to them 403
How the lord may approve the common under the statute of *Merton* 414
For what kind of common ejectment will lie 428
Trespass on the case lies by a commoner

for being deprived of the benefit of his common *page* 641
Will not lie for a small injury *ib.*
Case will lie against the lord for overstocking the common with conies, so that the commoners cannot enjoy their common *tam amplo modo* *ib.*
One commoner may maintain an action against another for surcharging, tho' he himself has surcharged *ib.*
A commoner cannot justify cutting down trees planted by the lord on the waste, but must bring an action *ib.*
What acts the lord may do as to the common *ib.*
How a commoner should declare for an injury to his common 652
How to declare against the lord *ib.*
What a commoner may plead to an action for incroaching on the common *ib.*
What plaintiff must prove in an action for surcharging a common 659
In actions for surcharge of a common plaintiff need not shew that he turned any cattle on it *ib.*

Vid. Prescription.

Commoners, how far they can be witnesses for one another 703

Company.

A member of any public company is subject to its bye-laws, and all claims under such bye-law are recoverable in assumpsit 7

Condemnation.

Goods condemned by a magistrate or court having competent jurisdiction, cannot be replevied 372
If goods have been legally condemned, though that is afterwards reversed on appeal, yet the first sentence shews probable cause sufficient to bar an action for malicious prosecution for the first seizing 529
Trover will not lie for goods which have been condemned by a court of competent jurisdiction, though a foreign one 543
But it will lie where goods have been condemned by courts of limited jurisdiction, to try if such courts have not exceeded their jurisdiction *ib.*
Where goods are condemned in the exchequer the property is altered, so that trover cannot be maintained for them 577

Coney.

Trespass will lie for entering a person's close and killing his conies *page* 404
 Case will lie by a commoner against the lord for overstocking the common with conies, and destroying the common 641
 But the lord may put conies on the common, and the commoner cannot destroy them, and fill up their burrows *ib.*

Confession.

Confession or admission made pending a treaty for a compromise or in confidence, cannot be given in evidence 791
Aliter where it is only the confession of an hand-writing *ib.*
 But a confession to a popish priest has been *ib.*
 Confession made when under arrest, and ignorant of the party's right, is not admissible 784

Consideration.

Where illegal, either wholly or in part, will not support assumpsit 88
 When the consideration is fraudulent, assumpsit will not lie 93
 Nor where it arises from an unconscientious demand 94
 Nor where it is frivolous or groundless, or a *nudum pactum* *ib.*
 Obligee may plead that the consideration of a bond was contrary to law 223

Consignment.

If goods are consigned to a creditor, the indorsement of the bill of lading conveys a property to the consignor 541
 How far the consignment to a factor conveys a property *ib.*
 How far consignments to other persons 544
 In what cases goods consigned may be stopped *in transitu* *ib.*

Conspiracy.

In what cases an action of conspiracy will lie 530
 How an action for conspiracy differs from an indictment *ib.*
 How from an action on the case in the nature of a conspiracy 531

In an information for a conspiracy the fact of meeting and conspiring need not be proved *page* 531

Constable.

In an action of assault against a constable he may traverse the place 319
 A person cannot be imprisoned for not taking on himself the office of constable without a previous indictment 332
 Actions against constables are to be commenced within six months after the injury done 338
 From what time the six months are to be reckoned *ib.*
 How to plead and justify under stat. 21 Jac. 1. *ib.*
 The privileges given to constables are confined to cases while acting in the execution of their office 340
 So it is only while acting in obedience of their warrants *ib.*
 So it only extends to torts *ib.*
 Constables must act within their district, or they are liable to actions 394

Constables are not liable for executing a justice's warrant, though the justice wants jurisdiction, under stat. 24 Geo. 2. c. 24. *ib.*
 Constable must act within his district, or he is liable to an action of trespass *ib.*
 May plead the general issue, and give the special matter in evidence 416
 Shall have double costs in trespass 425

Contempt.

A magistrate may commit for any contempt shewn to him while in execution of his office 334

Contract.

What contracts are good in the cases of sales 11
 In what cases the thing sold must be returned 13
 When the price of things sold and delivered can be recovered *ib.*
 What contracts are good under the statute of frauds *ib.*
 When express dissent appears, the law will not raise an implied contract to support assumpsit 86
 Where a contract consists of many parts, the performance of each part will support an action 129
 Where

Where there is a special contract or agreement, the plaintiff must declare on it *page 130*

Vid. Auction.

Conussee.

Conussee under an elegit cannot distrain or avow in replevin under stat. 32 H. 8. c. 37. *358*

Conveyances.

What conveyances or sales are void under stat. 13 Eliz. *Vid. Sales.*

Conviction.

Money levied under an illegal conviction may be recovered back in assumpsit *6*

Coparceners

Should join in avowry *374*
Should join in actions of trespass *404*
May join in ejectment *160*

Copy.

Where a copy of a note is good evidence *144*
Copies of records how given in evidence *747*
Sworn copies how given in evidence *748*
How office copies *ib.*
Copies are evidence of things where the original is lost *782*
Or in the hands of the opposite party *ib.*
Or of things of public nature *783*

Copyhold.

Surrenderee of a copyhold may maintain an action of covenant *294*

Vid. Fine.

An avowry by a copyholder for rent may be general without stating a title *358*
Executors and administrators of tenant in fee, tail, or for life, cannot distrain for rent due of copyhold lands *359*
How to prescribe for common against the lord or a stranger *364*
Copyholder is liable to trespass for cutting trees for house-bote, hedge-bote, or hay-bote *304*
In what cases copyholder or his lessee may maintain ejectment *441*

How far admittance in such cases is necessary to be proved *page 441*

Admittance of tenant for life is an admission of him in remainder *ib.*

No complete title vests till admittance *ib.*

When surrenderee is admitted, the admittance shall relate to the time of the surrender *ib.*

The declaration in ejectment by a copyholder, what it should state *448*

Ejectment for copyhold lands of ancient demesne shall be tried in the king's courts *454*

Devises of copyhold lands not within the statute of wills, 32 H. 8. *467*

Coroner.

Depositions taken before the coroner are good evidence, if the witness is dead *769*

Corporation.

Two corporations only to be allowed for the purposes of insurance *67*

Sole or aggregate may maintain an action of ejectment *676*

The amotion of a corporator must be by persons having authority *ib.*

What are good causes of amotion *ib.*

What are insufficient *677*

How far nonfeasance is sufficient *679*

How the corporation should proceed in removing a corporator *680*

The party should have notice what corporate elections are good, and what void *688*

What persons are ineligible *ib.*

What irregularity shall avoid an election *689*

Constructions on different charters *ib.*

What elections under bye-laws are good *694*

What elections are void for being before improper officers *696*

What for matters subsequent *ib.*

Costs.

In what case a judge may deprive the plaintiff of costs in assumpsit *171*

The court will order costs for not going on to execute a writ of inquiry *ib.*

Costs of a nonsuit are recoverable in debt *197*

In actions of assault where the damages are under 40s. the plaintiff shall have no more costs than damages *323*

What

- What shall give full costs page 323
 In what cases of assault the defendant shall have his costs 324
 Costs in an action of false imprisonment 341
 1st, *In Replevin*.
 If the plaintiff in replevin is barred, the defendant shall have his costs 375
 This shall extend to avowries for amercements and heriots, &c. *ib.*
 But in case of nonsuit there shall be no costs *ib.*
 Nor where the avowry is for a *nomine pæne* 376
 If there are several defendants in replevin, and one is acquitted, he shall not have his costs 378
 2dly, *In Trespass*,
 Costs were first given by the statute of Gloucester 421
 Stat. 43 Eliz. takes away costs where the damages are under 40s. *ib.*
 Stat. 22 & 23 Car. 2. c. 9. extends only to trespass *quare clausum fregit* 422
 In trespass *de bonis asportatis* there shall always be full costs *ib.*
 Where the freehold could not come in question, a certificate is not necessary *ib.*
 But where the freehold could come in question, and damages under 40s. there shall be no more costs without a certificate *ib.*
 In trespass for the mesne profits plaintiff shall not have full costs if he recovers less than 40s. *ib.*
 Where there are two counts in trespass, and one is *de bonis asportatis* and a general verdict, there shall be full costs 423
 In what cases the addition of special damages shall give full costs *ib.*
 In causes removed from the inferior courts, full costs are always given 424
 On writs of inquiry plaintiff shall always have his full costs *ib.*
 In cases of trespass by apprentices or inferior tradesmen, plaintiff shall have full costs under stat. 4 & 5 W. & M. c. 23. *ib.*
 Who is an inferior tradesman under the statute *ib.*
 Where the judge certifies the trespass to be wilful and malicious, the plaintiff shall have full costs by stat. 8 & 9 W. 3. c. 11. *ib.*
 At what time the judge must give his certificate *ib.*
 Defendant in trespass shall have his costs if he has a verdict, or the plaintiff is nonsuited page 425
 In trespass against several, if one is acquitted, he shall have his full costs, unless the judge certifies that there was good cause for making him a defendant *ib.*
 In actions of trespass against justices of peace, or their officers, they shall have double costs *ib.*
 To what cases the statute giving double costs extends 426
 Extends to churchwardens and overseers of the poor *ib.*
 How costs of a cause referred at *Nisi Prius* are to abide the event *ib.*
 3dly, *In Ejectment*.
 If the lessor of the plaintiff is an infant or abroad, proceedings will be stayed till security given for costs 492
 If there are several defendants and the plaintiff is nonsuited, he may pay the costs to which he pleases 493
 In what cases plaintiff shall be allowed to bring a second ejectment without payment of costs 494
 Costs of an ejectment cannot be recovered in an action for the mesne profits, if the ejectment has been regularly defended 495
 4thly, *In Slander*.
 Under stat. 21 Jac. 1. c. 16. in actions of slander, if the damages are under 40s. plaintiff shall have no more costs than damages 523
 But the jury may give full costs *ib.*
 The statute does not extend to cases where the words are not themselves actionable, but the consequential damage is the gist of the action *ib.*
 Though special damage is laid, if the words are actionable, and damages under 40s. there shall be no more costs *ib.*
 Where another offence is coupled with an action for words, there shall be full costs 524
 Defendant shall have full costs in slander *ib.*
 5thly, *In Trover*.
 If there are many defendants in trover, and one is acquitted, he shall not have his costs 597
 6thly, *In Case*.
 For rescous of a distress treble costs are given by stat. 2 W. & M. c. 5. 660
Concise.

Counsel.

How they may give evidence against
their client *page 717*

Countermand.

Defendant cannot plead that he count-
ermanded his promise in an action
of assumpsit 146

Court.

Where an inferior court gives judgment
in a case, where from the limits of
its jurisdiction the merits could not
be tried, assumpsit will lie to re-
cover back the money so adjudged 6

Where an attorney's business has been
done in an inferior court, he need
not deliver a bill 9

The sentence of foreign courts of jus-
tice, in what cases conclusive evi-
dence 145

Process sued out of an inferior court
shall prevent the statute of limitations
153

Debt will lie on a judgment of the
superior court 196

Or of a foreign court 197

So also will assumpsit *ib.*

So either will lie for a sum recovered
in a court baron *ib.*

Where a person has been arrested by
process out of a court not having
jurisdiction, false imprisonment will
lie against the plaintiff in that ac-
tion 330

So where it exceeds its jurisdiction 331

So where it has jurisdiction but the pro-
ceedings are irregular 332

How the defendant is to justify under
process of a court of limited juris-
diction 336

Every manor has of common right a
court baron annexed to it, so that to
claim it by prescription is bad 365

It cannot be severed from the manor
so as to be in different hands *ib.*

*Vid. Fine and Amercement, and Pre-
scription.*

Process out a court not having juris-
diction shall not justify the officer in
an action of trespass 391

Every person applying to courts of li-
mited jurisdiction should know the
extent of them, or they are not
justified in trespass 398

How the jurisdictions of courts are
limited 399

How an officer or party are to justify
under a court of limited jurisdiction
page 411

In what cases in trover things may be
brought into court 596

How far the proceedings in the eccle-
siastical court are evidence 758

Sentence of other courts good evidence
759

How they are to be given in evidence
762

Rolls of a court baron are good evi-
dence 763

Courtesy.

A voluntary courtesy will not support
assumpsit 87

What shall be deemed a voluntary
courtesy *ib.*

What shall not be deemed so 88

Covenant

Lies on an indenture or deed poll 266

Different kinds of covenant *ib.*

How covenants may be created 267

What words make a covenant *ib.*

Difference of covenants in deed and
law *ib.*

Covenant may lie on a recital of a
deed 268

Covenant referring to another instru-
ment shall be ruled by it *ib.*

What covenants are void 269

Covenants are to be construed accord-
ing to their spirit 270

Are to be taken most strongly against
the covenantor 271

The extent of covenants is to be limited
to the words in point of time, per-
sons, and duty *ib.*

Express covenants qualify those in law
273

How breach of covenant can only be
committed *ib.*

Covenant to pay rent, how far it binds
ib.

Covenant for quiet enjoyment, to what
it extends *ib.*

Who may commit a breach 275

Covenant to save harmless, how it shall
be broken 276

Covenant not to alien or assign, to
what it shall extend *ib.*

Not discharged by lessor's entry or li-
cence given 277

Covenant for repairs, how construed *ib.*

Covenant for further assurance, how
to be made 278

Covenant

- Covenant to pay taxes, how construed *page* 278
- Not to plough meadow, to what it extends 279
- Covenant to surrender or determine the term, how construed *ib.*
- Covenant secured by penalty, *Vid. Penalty* 280
- Bonds for performance of covenants, *Vid. Bond.* *ib.*
- Covenants mutual and independent, how to be sued 281
- Covenants dependent, how 282
- What covenants shall be deemed dependent or not 283
- From what the dependence or independence of covenants is to be collected *ib.*
- When an action lies on mutual covenants, and to be performed at the same time 284
- Covenant lies for a misfeasance, but not for a nonfeasance 285
- Action lies on covenants in law, though there is no act causing a breach 286
- On what things only a breach of covenant is assignable *ib.*
- At what time only it can be committed 287
- How joint and several covenants are to be construed *ib.*
- For covenant against assignee and heir, *Vid. Assignee and Heir.*
- Who must take advantage of a covenant 293
- How breach is to be assigned on covenants in the alternative, or depending on a contingency 300
- Vid. Declaration and Pleading.*
- Cranage and Wharfage.*
- Cranage and wharfage recoverable in assumpsit, under what circumstances 10
- Crop.*
- Custom as to it 386
- Custom.*
- Sums claimed by the custom of the manor must be reasonable 371
- Such cannot be claimed from a stranger *ib.*
- Custom that tenants may have their way-going crops, and leave them on the premises, is good 386
- If a custom is relied on or pleaded, the whole of it should be set out *page* 386
- One custom cannot be pleaded against another without a traverse, but a qualification of the first may be pleaded 373
- Steward of a manor admitted to prove a custom 715
- Customs.*
- Assumpsit will lie for petty customs 8
- Vid. Excise.*
- D**
- Damages.*
- The plaintiff in assumpsit may recover less damages than he lays in his declaration, but cannot recover more 169
- The jury may give less damages than are proved *ib.*
- Damages cannot be taken advantage of by a set-off 234
- The jury in debt on a bond may give damages beyond the penalty 262
- The damages in covenant for not repairing, what they should be 310
- How far a recovery of damages in a former action of assault is a good plea in bar 319
- Plaintiff in actions of assault can recover but single damages 321
- The court may in the case of malhem increase the damages on a view 322
- What in such case must appear to the court *ib.*
- If the plaintiff in replevin be barred, the defendant shall have his damages and costs by stat. 21 H. 8. c. 19. 375
- To what cases this extends *ib.*
- Where defendant shall have damages where the plaintiff is nonsuited before issue joined *ib.*
- Where after 376
- Vid. Costs in Replevin.*
- The plaintiff in trespass can recover no more damages than he has laid in his declaration, though he may for damages and costs together 420
- In joint actions of trespass the jury cannot sever the damages *ib.*
- But where the defendants sever in their pleas, they may *ib.*
- In what cases plaintiff shall have no more costs than damages, *Vid. Costs.* 11

If general damages are given in slander, and any of the counts are bad, in what cases judgment shall be arrested, and in what a *venire facias de novo* granted page 523

The court will not grant a new trial in malicious prosecution for excessive damages 537

The jury cannot sever the damages where the action is against several *ib.*

The judgment in trover can only be for damages, not that plaintiff shall have his goods again 597

The jury cannot assess damages and costs together to more than the damages laid in the declaration *ib.*

In an action against a sheriff for a false return, the jury may give the whole debt in damages 663

Damage Feasant.

How a distress for damage feasant may be taken 360

How the party may tender amends *ib.*

Vid. Common.

In avowry for damage feasant, if the plaintiff is nonsuited, defendant shall have his costs, &c. by writ of inquiry 376

Trespass lies for things damage feasant 386

If a distress has been taken, trespass will not lie, even though the distress escapes 387

Aliter if it dies in pound *ib.*

Debt.

Debt, for what it lies 172

On what simple contracts it will not lie *ib.*

On what special contracts it will lie *ib.*

Vid. Bond, Judgment, Amercement, Rent, &c.

Deceit.

Money obtained by deceit is recoverable in assumpsit 21

An action on the case will lie for a deceit, if a party, knowing another to be in insolvent circumstances, represents him to a third person as a man of credit 633

But this will not lie if the person who receives the information knew to the contrary *ib.*

Declaration.

Vid. Pleading.

1st, *In Assumpsit.*

Where the declaration in assumpsit should aver performance page 139

Where notice and request should be averred *ib.*

Not necessary in declaring on a note of hand 131

Where the day and place should be stated in the declaration 132

How far plaintiff's right should be shewn in the declaration *ib.*

Where performance is averred, how it should be shewn to be performed 133

Declaration should shew for what the debt accrued *ib.*

How the declaration should be for money lent and advanced *ib.*

The breach assigned should follow the undertaking 134

How to declare on a delivery on a day certain *ib.*

How to declare on a statute *ib.*

The day laid in the declaration is not material 135

Where it is material 136

How to declare on an *in simul computasset* *ib.*

How to declare against the acceptor of a bill of exchange *ib.*

How to declare as a partner 137

How to declare on cases under the statute of frauds *ib.*

How to declare as assignee of a bankrupt *ib.*

How as an executor 138

How against an executor *ib.*

2dly, *In Debt.*
The declaration in debt may state more to be due than the defendant can prove 206

The declaration in debt on simple contract need not allege any express contract, or lay any plan when the contract was made *ib.*

In declaring on a bond, how it must be stated *ib.*

How plaintiff must declare if the instrument be lost 207

When the defendant is entitled to *oyer* of a deed *ib.*

But a single breach shall be assigned 208

What

- What shall be deemed a single breach *page* 208
- Where a single breach is assigned, it should be fully and particularly stated how the breach accrued *ib.*
- The breach must be so assigned that it may appear to be within the condition of the bond *ib.*
- If the breach is within the condition, it need not be assigned in the words of it 209
- Where defendant pleads performance, or matter of excuse, plaintiff need not assign a breach *ib.*
- Exception in the case of an award *ib.*
- When a bond is in the disjunctive, how to declare *ib.*
- How plaintiff must declare in debt on a contract 210
- How to declare on a bond dated at a certain place *ib.*
- If the deed produced be the same in substance with that declared upon, matter of surplusage or no way variant of the deed will not vitiate *ib.*
- How plaintiff is to declare in debt for rent on a lease at will 211
- Where rent is reserved quarterly or half-yearly, plaintiff may declare for an entire gale at the end of the quarter, without shewing how the former quarter or half-year was satisfied; but if he declares for part, he must shew how the residue was satisfied 212
- So the declaration should state when it was due and ending *ib.*
- How plaintiff should declare where the rent is reserved annually *ib.*
- Miscital of a lease is fatal *ib.*
- How to declare against lessee or assignee 212, 213
- How plaintiff should declare in debt on a bail bond 213
- How in debt for an amercement *ib.*
- When matter of record is to be truly alleged 214
- In declaring on a judgment, where the venue is to be laid 215
- How it is to be declared on *ib.*
- How the declarations on a bond for rent and on judgments are to conclude *ib.*
- How to declare against the contracting party himself or his heir 216
- How against executors and administrators 217
- Where the venue is to be on a judgment against an administrator and executor *page* 217
- How executors or administrators are to declare 218
- How the declaration is to be against baron and feme 219
- How by or against an assignee 220
- 3dly, *In Covenant.*
- The declaration should state the covenant to be by deed 208
- But the whole deed should not be set out *ib.*
- Where a general assignment of a breach is good 206
- How breach of covenant is to be assigned 209
- The breach must be fully set out *ib.*
- How far a proviso or exception is to be set out 300
- Where a covenant is in the alternative, how a breach is to be assigned *ib.*
- Breach of covenant by any person should set it out to be by claim of title 301
- How far the title is to be set out 302
- If the breach is by a person included in the covenant, no title need be set out *ib.*
- How far the breach of covenant is to be stated as it respects assignees *ib.*
- Mis-stating the estate under which the covenant is brought, is error 303
- In covenants certain, there is no apportionment *ib.*
- How to declare on joint covenants 304
- Where covenant for non-payment of rent is to be brought *ib.*
- Where averment of previous performance is necessary *ib.*
- 4th, *In Assault.*
- Declaration in assault cannot lay the offence at different days and times 316
- The offence should be positively charged *ib.*
- How to declare for a battery of the wife *ib.*
- What things plaintiff may lay, by way of aggravation 317
- 1st, *In Replevin.*
- When the declaration should be in the debt, and when in the detinet 350
- The declaration should state the number and kind of cattle or other things taken *ib.*
- Should

- Should state a place where *page* 351
 2d, *In Trespass*.
- If plaintiff sues out a general writ of
 trespass, how he may declare 405
- How if a special writ *ib.*
- When in such a case shall plaintiff be
 driven to his new assignment *ib.*
- Plaintiff in trespass may declare gene-
 rally, and state the particular injury
 in his replication *ib.*
- In trespass *de bonis asport*, the par-
 ticular goods should be stated in the
 declaration *ib.*
- Aliter where the taking is only laid by
 way of aggravation 406
- In trespass *de bonis asport*. property or
 possession must be stated in the de-
 claration 407
- So the declaration should state the va-
 lue of the goods *ib.*
- Plaintiff may join many things in his
 declaration for which he could not
 have an action himself *ib.*
- In trespass the day laid in the declara-
 tion is not material *ib.*
- What trespasses may be laid with a *con-*
tinuando, and what not *ib.*
- The declaration must always be *vi et*
armis 408
- And *contra pacem domini regis* *ib.*
- Vid. Replication.*
- In ejectment the declaration should
 be according to the plaintiff's title 444
- The demise to the plaintiff must be laid
 after lessor's title accrued *ib.*
- It is not necessary to lay any day
 certain on which plaintiff entered 445
- The ejectment by defendant must be
 laid subsequent to the date of the
 lease *ib.*
- No particular day of *ouster* need be
 laid *ib.*
- But the repugnancy must not go to the
 title 446
- The declaration should state the quan-
 tity and nature of the land *ib.*
- An uncertainty in the description in
 the declaration is fatal 447
- An exact description of the lands is not
 necessary 448
- Declaration in ejectment for tithes
 should state the nature of them *ib.*
- And the demise to be by deed *ib.*
- If the ejectment is on the demise of se-
 veral, each must have an interest in
 the whole *page* 448
- Therefore tenant for life and him in
 remainder or tenants in common
 cannot join in a demise in ejectment
ib.
- But joint-tenants and parceners may 449
- How husband and wife should declare
 in ejectment *ib.*
- How copyholder should declare *ib.*
- 4th, *In Slander.*
- How far *innuendos* in the declaration
 for slander are admissible 513
- Shall not make the person certain *ib.*
- How far an averment shall be admitted 514
- Declaration for a libel must have the
 proper averments to make it certain
ib.
- Where the words are themselves ac-
 tionable, no averment is necessary 515
- What things a declaration for scan-
 dalous words used of a trader must
 state *ib.*
- How the declaration as to baron and
 feme must be laid *ib.*
- How to declare on the tenor of words 516
- What shall be sufficient to state as to
 the publishing of a libel *ib.*
- The declaration in slander need not
 state the words not to be true *ib.*
- Where the libel is in a foreign lan-
 guage, the words must be set out in
 the original language 517
- 5th, *In Malicious Prosecution.*
- The declaration should state the first
 suit to be at an end, and determined 531
- How to declare for holding the de-
 fendant to excessive bail 532
- The declaration need not copy exactly
 the style of the court where the first
 suit or indictment was determined
ib.
- What misrecitals in the declaration are
 fatal *ib.*
- 6th, *In Trover.*
- Plaintiff may declare on a *devenerunt*
ad manus of the defendant generally 507
- The declaration need not state parti-
 cularly the nature, or quality, or
 description

- description of the things converted *page* 507
- It should state the time of the conversion 588
- So it should state a place where *ib.*
- Need not allege the value of the goods *ib.*
- How to declare in trover by or against baron or feme *ib.*
- How executors or administrators may declare in trover 589
- 7th, *In Case.*
- The declaration should state the manner in which the injury was committed 651
- Plaintiff may recover for any part of the time laid in the declaration 652
- The day laid in the declaration is not material 653
- Any misrecital of a writ in declaring in the action is fatal 652
- In declaring against a carrier on the custom of the realm not necessary to state any sum which was to have been paid for the carriage, &c. *ib.*
- How a commoner should declare *ib.*
- How a plaintiff should declare where a nuisance has been continued 653
- How plaintiff should declare for a disturbance of an easement, fair, &c. *ib.*
- How a person should declare against a master for injuries done by the servant *ib.*
- Decree.*
- Decree** in Chancery when it is evidence 758
- Deed.*
- When money is due by deed, assumpsit will not lie 96
- In what cases it may *ib.*
- How a deed shall be avoided by plea 223
- One person may execute a deed for two 224
- What is a good execution of a deed 257
- Where collateral evidence shall supply the proof of the execution 258
- How the execution of old deeds is to be proved 259
- Covenant lies either on a deed indented or deed-poll 266
- If a person is named in the deed but is not a party to it, though he seals it, no action lies for or against him *page* 288
- No one can maintain covenant on a deed to which he is not a party 297
- Deed may be declared on as lost by time and accident 298
- Replevin will not lie for deeds or charters relating to land 372
- Trover will lie to recover deeds 545
- To what matters deeds are evidence 769
- Deed itself must be produced *ib.*
- In what cases not 770
- Deed how proved in evidence 772
- In what cases copy of a deed is good evidence *ib.*
- A party is not allowed to acknowledge his own deed in court 773
- How proof of the execution must be made *ib.*
- In what cases proof of it is dispensed with, *Vid. Assignment* 774
- Where a party offers parol evidence of a deed, he must shew that he used due diligence to get the original *ib.*
- Old deeds need not be proved by the subscribing witnesses *ib.*
- Where a deed is in possession of the opposite party, an examined copy is evidence, without proving the execution 782
- Defeasance.*
- In what case a subsequent instrument may operate as a defeasance of a former deed 221
- What deeds shall be deemed a defeasance of one another 288
- Where a deed is joint, a defeasance to one is a defeasance to all *ib.*
- When a defeasance may be made to a lease for years, and when for life 289
- A covenant in one indenture is only pleadable in bar of a covenant when it is intended to operate as a defeasance 305
- Delivery.*
- What evidence of the delivery of goods is sufficient 142
- Obligor of a bond cannot plead that the delivery was conditional when made to obligor himself 221
- Aliter* as an escrow to a stranger 222
- Delivery*

Delivery of the bond must be proved by the subscribing witness *page 257*

Deposit.

A deposit made by a purchaser at a sale is recoverable in assumpsit, if a good title is not made out, or where there is a concealment of circumstances 11
But he shall only recover his deposit with interest, not any damages for the supposed loss of a bargain *ib.*
In what case vendee shall forfeit his deposit 16
What deposit good at sales by auction 15

Depositions.

Depositions in Chancery when they are evidence 755
In what cases they are admissible evidence 757
Depositions before a justice of peace, how far evidence 768
How far of a pauper who has become insane *ib.*
How far depositions before commissioners of bankrupt 768

Deputy.

What bond only a deputy to an office can make to his principal 180

Devastavit.

Vid. *Administrator, Executor, Assets.*

Devisee

May maintain debt for rent arrear 202
Devisee of lands is liable to the debts of the devisor under stat. 3 & 4 W. & M. c. 14. 248
Devisee of a term for years may maintain an ejectment for it, if the consent of the executor appears 436
But devisee of a freehold may enter immediately and maintain ejectment *ib.*
Devisee cannot be admitted as landlord to defend in ejectment if he has never been in possession 453

Vid. Will.

Dilapidations.

Where an incumbent has been guilty of dilapidations, the sum expended
Vol. II.

by his successor in necessary repairs is recoverable in assumpsit *page 85*

Disceit.

Vid. *Warranty and Sale.*

Disclaimer.

In what cases disclaimer is a good replication in replevin 373
In trespass *quare clausum fregit*, the defendant may plead a disclaimer and tender amends 416

Discontinuance.

A plea not answering to the whole declaration is a discontinuance 146
If the plaintiff in replevin declares of several takings, and defendant does not answer to all, it is a discontinuance 351

Distress.

Levied by distress is a bad plea to an action of covenant for rent arrear 309
All rents may now be distrained for 355
Trustee of a term to secure an annuity may distress 356
In what cases a demand should precede a distress so as to make it lawful, and in what it is not necessary *ib.*
A distress should be made for the entire rent which is due *ib.*
If a tender of rent is made before the distress taken, it is tortious 357
When the tender should be made *ib.*
Under stat. 32 H. 8. c. 37. the executors or administrators of tenants in fee, tail, or life, may distrain for rent while in the possession of the tenant who ought to have paid 358
Husbands seised in right of their wives, may distrain in like manner *ib.*
Tenants *pur auter vie* may distrain living *cestui que vie* 359
Executors and administrators of tenants for years may distrain under stat. 32 H. 8. *ib.*
What constructions have been made on this statute *ib.*
Trespass will not lie for taking an excessive distress 381. 400
No subsequent irregularity in the case of a distress shall make the party a trespasser
D d

- trespasser *ab initio*, by stat. 11 G. 2. c. 19. *page* 400
 But trespass still lies for an unlawful taking *ib.*
 Trover will not lie for goods taken under an irregular distress 381
 In what cases doors may be broken to make a distress 382
 In the case of distresses for poor rates, no fault in the warrant, &c. or irregularity, shall make the party a trespasser by stat. 17 G. 2. c. 38. *ib.*
 How the warrants may be to distrain for poor rates *ib.*
 Without possession, trespass will not lie 383
 What things may be distrained, and what not 386
 Beasts of the plough may be taken as distresses for poor rates *ib.*
 What things are privileged from being distrained *ib.*
 How far implements of trade may be taken *ib.*
 Distresses must be impounded in the county where taken *ib.*
 Remedy if otherwise treated *ib.*
 For an excessive distress the remedy is an action founded on the statute of *Marlbridge* *ib.*
 If a distress is the justification in trespass, what the party must prove 419
 Goods distrained for not appearing in *curia manerii* cannot be sold 595
- Dog.**
- Trespass on the case lies for keeping a dog used to bite 601
 But in such case the owner must have notice of the dog's fault 602
 What is notice sufficient *ib.*
 If the injury arises from the plaintiff's own want of care, the owner of the dog is not liable *ib.*
 What proof will support the averment of the *scienter* in the declaration *ib.*
- Doomsday-book**
- Is good evidence of ancient demesne 765
- Durefs.**
- Bonds made under durefs are void 174
 What circumstances of arrest shall be deemed durefs *ib.*
- Durefs shall only avoid the bond as to the principal, not as to the surety *page* 174
- E**
- Earnest.**
- How far earnest binds a bargain 15
 The earnest is to be deemed as part of the price 16
- Easement.**
- In declaring for an easement over the land of the defendant, plaintiff must shew a title, *aliter* where over the lands of a stranger 653
 Where a party prescribes for an easement, defendant cannot plead a contrary prescription 655
- East-India Company.**
- Copies from their transfer books, evidence 783
- Ejectment.**
- Tenant on whom an ejectment is served must give his landlord notice under a penalty of three years rent 189
 Is either on the title, or for non-payment of rent 427
 How an ejectment is to be brought *ib.*
 For what things ejectment lies *ib.*
 Vid. *Common, Tithes, Highway, Manor, Watercourse, Church.*
 How an ejectment is to be brought for non-payment of rent under stat. 4 G. 2. 429
 Where there has been a recovery in ejectment under the statute, after the possession acquiesced in, all proceedings shall be presumed regular *ib.*
 Proceedings will in all cases be stayed on payment of rent arrear and costs 430
 After tender of the rent due, if ejectment is brought it is irregular *ib.*
 A landlord who has a right of entry for non-payment of rent, cannot recover in ejectment for non-payment of rent, unless he demand the rent on the day it becomes due, nor under the statute, if there be a sufficient distress on the premises *ib.*
 When a person has no right of entry, he cannot maintain an ejectment *ib.*
 What

- What shall be considered a defect of right of entry *page* 430
- Assignee of the bankrupt cannot maintain ejectment for the lands of the bankrupt until the assignment has been inrolled 431
- Where tenant in tail discontinues in fee and dies, his heir cannot maintain ejectment *ib.*
- So if the husband discontinues in fee the wife's land, she may have ejectment after his death, under stat. 32 H. 8. c. 28. *ib.*
- If the wife aliens the lands coming from the husband as dower, or otherwise, the heir of the husband after death may enter and have ejectment, stat. 11 H. 7. c. 20. *ib.*
- No person shall have a right of entry into lands after 20 years peaceable possession, stat. 21 Jac. 1. c. 16. 432
- The confession of lease, entry, and ouster to a former action of ejectment brought within 20 years, shall not prevent the statute from running *ib.*
- The possession within 20 years must be an actual, not a presumptive possession *ib.*
- Possession for 20 years is itself a good title to plaintiff in ejectment 432
- But the possession must be adverse 433
- Vid. Mortgage, Tenant, Devise, Bankrupt.*
- What possession shall be deemed adverse 433, 434
- Presumption of adverse possession is not sufficient 435
- Where actual possession is not necessary to be proved *ib.*
- Where the ejectment is grounded on a right of re-entry for non-payment of rent, an actual entry is not necessary *ib.*
- Vide Statute, Elegit, Rent, Lunatic, Infant, Executor, Corporation, and Copyholder; in all which cases an ejectment may be maintained.*
- The declaration in ejectment must be always personally served 441
- In what cases it may be fixed on the door, under stat. 4 G. 2. c. 28. *ib.*
- If plaintiff proceeds as on a void possession, where it is not so, it is irregular 442
- Service of the ejectment on the wife or servant, in what cases it is good *ib.*
- Where personal service cannot be made, the court will allow other service to be good by rule of court *page* 442
- Where there are several tenants, all must be served *ib.*
- When the defendant must plead 443
- The tenant must give notice to his landlord of the ejectment served, under penalty of three years rent *ib.*
- But this is only required where it is adverse, not where by a mortgage *ib.*
- If the tenant does not give notice, the court will afterward admit the landlord to defend, and make the tenant pay the costs *ib.*
- Vid. Declaration, Fine, Plea.*
- How the defendant must confess lease, entry, and ouster 449
- What effect a fine shall have to bar an ejectment 450
- How it shall be avoided *ib.*
- In case of a fine, an actual entry must be proved *ib.*
- In cases of entry for non-payment of rent, confession of lease, entry, and ouster is sufficient 452
- In case of tenants in common, confession of lease, entry, and ouster is sufficient *ib.*
- The landlord by entering into the usual rule may be made a defendant under stat. 21 Geo. 2. c. 19. *ib.*
- But he must be landlord, or have been in possession *ib.*
- Mortgagee, devisee, purchaser of the reversion, or a mere stranger cannot be admitted as defendants in ejectment *ib.*
- But the lord by escheat may *ib.*
- Where the defendant confesses lease, entry, and ouster, he does not admit that he is in possession 453
- How particular estates in ejectment are to be pleaded 455
- Where a judgment in ejectment has been signed for want of a plea, a judge at his chambers may compel plaintiff to accept a plea, if possession has not been delivered *ib.*
- Plaintiff in ejectment must always prove a good title in himself *ib.*
- If defendant proves a good title out of the lessor of the plaintiff, it is sufficient *ib.*

- Defendant in ejectment may set up a title in himself, or prove his lessors at an end *page 456*
 But it must be a good and subsisting one *ib.*
 Plaintiff in ejectment shall not be nonsuited by a term standing out in his own trustee, or by setting up an old and satisfied mortgage term 457
 How far a legal term, satisfied or not, may be set up against the lessor of the plaintiff 458
 Where several matters are necessary to give a complete title, plaintiff must prove all those requisites *ib.*
 In ejectment for a rectory, what must be proved *ib.*
 Reasonable presumption is to be admitted in favour of a title 459
 Every part of the declaration must be proved *ib.*
 Of leases at will *ib.*
 In ejectment on a demise at will, notice to quit must be proved 460
 At what time notice must be given *ib.*
 An infant entitled to a reversion, when he comes into possession, must give a legal notice to quit *ib.*
 How the notice must be *ib.*
 May have relation to the tenancy 461
 Must be to quit at the end of the year *ib.*
 How the notice as to the precise time may vary according to the custom of this country *ib.*
 Tenant not obliged to inform his landlord of the time his term commences 462
 Must be positive *ib.*
 The form of the notice *ib.*
 Of the service of the notice *ib.*
 In what case notice is unnecessary *ib.*
 What shall be a waiver of the notice to quit 462, 463
 Of leases void or voidable, and what shall amount to a confirmation 464, 465
 Difference in this respect between leases for lives and years 466
 Of ejectment under wills *ib.*
 If a tenant enters under a void lease, no notice to quit is necessary 464
 If ejectment is brought by a person claiming as heir at law, he must prove a regular pedigree 467
 Vid. *Evidence, Witnesses, Verdict, Habere, Judgment, and Costs.*
 Though a judgment in ejectment has been regularly obtained, the court will set it aside upon payment of costs *page 491*
 How error is to be brought on a judgment in ejectment. Vid. *Error.*
 If the lessor of the plaintiff is an infant, or abroad, the court will stay proceedings until security for payment of costs 492
 Plaintiff shall not be allowed to bring a second ejectment without payment of costs in the first 493
 Even though there is some difference in the parties, if the title is the same *ib.*
 Defendant shall not be allowed to bring an ejectment pending a writ of error on the first, unless he is out of possession 494

Election.

 A wager on the event of an election, how far it is recoverable in an action of assumpsit 18
 Case lies for refusing a candidate a poll at any election 646
 If a person entitled to vote tenders it to the returning officer, and he refuses it, case lies for such refusal 647
 Case lies against a returning officer for a false return on an election *ib.*
 In case of a false return of members to parliament, the party injured shall recover double damages by stat. 7 & 8 W. 3. c. 7. *ib.*
 Under what circumstances an action will lie under this statute *ib.*

Elegit.

 Fees for executing an elegit are recoverable in assumpsit
 Tenant by elegit may maintain an action of covenant 293

Vid. Conusee.

 Tenant by elegit may maintain an ejectment 437
 What in such case he must prove *ib.*
 How the sheriff is to execute an elegit *ib.*

Embezzlement.

 Money or notes embezzled, are recoverable by action of assumpsit 5

Emblements.

 In estates of uncertain duration, the tenant shall have the emblements where the estate is determined by the act of law or of God 384
Aliter

Aliter where determined by the act of
 lessee himself page 385
 Case of leases at will *ib.*
 In leases of certain duration, the tenant
 shall not have the emblements 386
 But in such lease he may have them by
 the custom of the country *ib.*

Entry and Eviction.

Entry and eviction from the whole or
 a part, is a good plea in debt for
 rent 235
 But a mere entry without eviction is
 not a good plea *ib.*
 How to be pleaded *ib.*
 On *nil debet* pleaded, entry and evic-
 tion may be given in evidence 262
 Entry and eviction how to be pleaded
 in bar to an action of covenant 307
 A mere entry not sufficient *ib.*

Error.

In what cases the court will stay pro-
 ceedings pending a writ of error
 195, 196
 A writ of error in an action of false
 imprisonment, how far it is amend-
 able under stat. 5 G. 1. c. 13. 341
 If the plaintiff in ejectment brings a
 writ of error, he shall be bound in
 double the rent 491
 Defendant is entitled of right to a writ
 of error *ib.*
 The court will annex terms to the
 granting of a writ of error. *ib.*
 A writ of error cannot be sued out in
 the name of the casual ejector *ib.*
 Nothing shall be assigned for error in
 ejectment which will make it neces-
 sary to go into the title 492

Escape.

Debt lies against a sheriff for an escape
 of a person in his custody 203
 What shall be an escape sufficient to
 charge him *ib.*
 Declaration in debt for an escape need
 not say *prout patet per recordum* 214
 How executors may declare in debt
 against a sheriff for an escape 237
 What is a good plea for a sheriff to debt
 on an escape *ib.*
 To charge an officer with an escape,
 the arrest must be lawful 604

Vid. Arrest.

If any person committed to the custody
 of the sheriff, on a final process, is
 seen at large, it is an escape page 606

A sheriff may shew what indulgence he
 pleases to a person committed on
 mesne process 605

Aliter in the case of the marshal of
 K. B. or warden of the Fleet *ib.*

A sheriff is not obliged to carry a per-
 son arrested to mesne process to pri-
 son, even when the return of the
 writ is out, if plaintiff is not de-
 layed in his suit 606

When the old sheriff in handing over
 the prisoners to the new omits any,
 it is an escape *ib.*

How the old sheriff must hand over the
 prisoners to the new *ib.*

The person escaping must be legally in
 custody, or it is no escape 607

And must have been arrested by the
 sheriff's own officer *ib.*

If the bailiff of a liberty brings a pri-
 soner out of his liberty, it is an
 escape 608

The sheriff is only answerable for an
 escape from himself, or from one of
 his own officers *ib.*

The sheriff is liable in the case of an
 escape, when the prisoner is in cus-
 tody on a *capias utlagatum* *ib.*

No action will lie against a sheriff when
 the arrest has been on void process
 609

Where the court has jurisdiction, the
 process is not void *ib.*

Aliter where the process is erroneous
ib.

What rescue shall excuse the sheriff in
 cases of escape 610

Vid. Rescue.

A recaption on fresh suit shall also ex-
 cuse the sheriff 611

In cases of voluntary escapes, the gaoler
 cannot retake his prisoner *ib.*

But he may in the case of negligent
 escapes *ib.*

The recaption must be on fresh suit *ib.*
 And be before action brought *ib.*

If the party voluntarily returns, it is
 equivalent to a recaption on fresh
 suit *ib.*

Where an action has been brought
 against the gaoler, the sheriff is dis-
 charged 612

- But proceedings in the original action shall not discharge the action against the gaoler *page 612*
- Nor in the case of voluntary escapes shall the subsequent assent of the plaintiffs purge the escape *ib.*
- The sheriff may have an action against the party escaping, though he himself has not been sued *ib.*
- But the bailiff who made the arrest cannot *613*
- In case for an escape, plaintiff may either lay the venue where the escape was, or where the party was seen at large *651*
- How the plaintiff must declare against the bailiff of a liberty *ib.*
- How an executor must declare for an escape *652*
- In actions for escapes, plaintiff must prove a good cause of action *656*
- But he need not produce the writ, the return is sufficient *ib.*
- The confession of the under sheriff is good evidence to charge the sheriff *657*
- The party escaping may be a witness to prove a voluntary escape *656*
- In an action for escapes, the party cannot take advantage of error in the process *659*
- What verdict in escapes is good *660*
- Escheat.*
- The lord by escheat cannot sue in an action of covenant *354*
- Escrow.*
- When a bond shall be taken as an escrow, and how to be pleaded *222*
- Estray.*
- Trespass will not lie against the owner of an estray for taking him off the land of the lord of the manor, without paying for his keeping *400*
- How the owner of an estray should plead tender of satisfaction *401*
- The lord may maintain trover for an estray within the year and day *577*
- Evidence.*
- 1st, In *Assumpsit*.
When an action will afford an opening to indecent evidence, it shall not lie *18*
- How far a special agreement in *assumpsit* must be proved *page 138*
- The evidence must prove the agreement expressly as laid *ib.*
- What plaintiff must prove where an agreement is in the alternative *139*
- In *assumpsit* if plaintiff has a count on a *quantum meruit*, and on a special agreement, if he proves an agreement different from that laid in the declaration, he can recover on neither count *ib.*
- What proof is necessary where different considerations are alleged *ib.*
- But if plaintiff fails in the special agreement in *indebitatus assumpsit*, he may go into evidence of the general counts *140*
- When the contract is entire, he must recover on the whole contract, and cannot on the common counts *ib.*
- The plaintiff's proof must correspond with his title *ib.*
- In *assumpsit* against several, a joint contract must be proved *ib.*
- What must be proved in an action against partners *141*
- On an *in simul computassent*, the exact sum need not be proved *ib.*
- Evidence of goods sold. *Vid. Book.*
- Where a man may use his book of accounts to refresh his memory *142*
- In *assumpsit* for goods sold, the factor is a good witness for either party *ib.*
- In *assumpsit* against an executor, the plaintiff must prove his debt *ib.*
- Payment of interest by an executor on a legacy, is admission of assets *ib.*
- An offer to pay, not an admission of the debt *143*
- What evidence is proof of interest and loss in cases of policies of insurance *144*
- In declaring on a bill, note, or contract, the instrument itself must be produced, unless lost, and then a copy is evidence *ib.*
- What is good proof of a person's handwriting *ib.*
- The sentence of foreign courts of justice is conclusive evidence of all matters wherein they have cognizance *145*
- Neither will the courts examine into the grounds of their decision *ib.*
- Pre.

- Presumption good evidence in assumption, in what case *page* 144
 Where a copy of a note is evidence *ib.*
 What defendant may give in evidence under the general issue 167
 2dly, In *Debt*.
 In action by the assignees of an insolvent person, what good evidence 245
 How far averments in the declaration are to be proved 257
 How far a lease made by an attorney is evidence 259
 What evidence is good under *plene administravit* 260
 What evidence is good under *nil debet* 262
 3dly, In *Covenant*.
 The evidence must be consistent with the deed 309
 Where plaintiff declares in covenant on deed, he shall not be allowed to go into evidence of any matter out of the deed *ib.*
 When plaintiff assigns a breach generally, and after narrows it to a particular matter, he must confine his evidence to that matter only *ib.*
 4thly, In *Assault*.
 In an action of assault the plaintiff cannot give in evidence a conviction on an indictment for the same cause 320
 How far the day is material *ib.*
 Difference of what may be given in evidence on *son assault demesne*, and on not guilty *ib.*
 5thly, In *False Imprisonment*.
 Under the replication of *de injuria sua propria* no new matter is admissible evidence 420
 6thly, In *Adultery*, *vid. Adultery*.
 7thly, In *Trespass*.
 Nothing shall be given in evidence in trespass which is out of the issue 417
 What may be given in evidence under the general clause of *alia enormia fecit* in the declaration in trespass *ib.*
 If plaintiff sets out the abutments of his close, he must prove them as laid *ib.*
 If trespass is laid with a *continuando*, the evidence must be confined to the time in the declaration 418
 In trespass *de bonis asportatis*, the plaintiff can only give evidence of the taking of the things laid in the declaration *ib.*
 In justifying under a distress for rent what defendant should prove 419
 If plaintiff makes a new assignment, he waives the place laid by the defendant, and cannot give evidence of a trespass there *page* 418
 If defendant proves a good justification, it shall be good though not strictly as pleaded 419
Vid. Sheriff, Execution, Officer.
 8thly, In *Ejectment*.
 Plaintiff in ejectment must prove a good title in himself 455
 It is sufficient for the defendant to shew a good title out of the lessor of the plaintiff *ib.*
 In favour of a title, presumption is good and admissible evidence 459
 In case of an old lease and possession, all mesne assignments shall be presumed *ib.*
 In the declaration in ejectment, all the parts of it must be proved *ib.*
 In ejectments on demises at will, notice to quit must be proved 460
 In ejectment for a rectory, what must be proved 458
 How evidence may be given of the due execution of a will 473
Vid. Witness, Will, Bastard.
 How far the evidence of the father and mother is admissible to bastardize their issue 486
 If letters of administration have been lost, how their evidence may be supplied 488
 An old terrier of land is evidence in ejectment *ib.*
 Terrier of glebe evidence where it is signed by the churchwarden *ib.*
 But a survey by one party is not evidence *ib.*
 Hearsay declarations admissible evidence as to parcel or not parcel 491
 9th, In *Slander*.
 Plaintiff can only go into evidence of the special damage laid in the declaration 520
 It is sufficient for plaintiff to prove the substance of the words laid, not the words themselves 521
 How far a *colloquium* must be proved *ib.*
 What shall be sufficient evidence of a person's business in such case *ib.*
 What evidence to charge the proprietor of a newspaper is good 522
 What a common person *ib.*
 Where the declaration states a person to be editor and proprietor it must be proved as laid *ib.*

In an information for a libel defendant cannot give in evidence, though a paper similar to that for which he is prosecuted was published by other persons, at a former time for which they were not prosecuted *page* 522
10thly, *In Malicious Prosecution.*

What evidence in malicious prosecution for holding to excessive bail is evidence of the affidavit of debt 524

In malicious prosecution for a former indictment for felony, there must be a copy of the record and acquittal granted by the court where the trial was given in evidence *ib.*

Aliter where the indictment was for a misdemeanor *ib.*

What plaintiff may give in evidence to increase the damages 535

What shall be proof that the prosecution was at defendant's suit *ib.*

What shall be evidence that the suit was at an end 536

If the party got off on a *noli prosequi*, it will not support the declaration *ib.*

In the case of a conspiracy there is no necessity to prove the fact of meeting and conspiring *ib.*

What shall be sufficient evidence of a probable cause in favour of the defendant *ib.*

11thly, *In Trover.* Vid. *Bankrupt.*

Where there has been a tortious taking of the goods, an actual conversion need not be proved 589

Aliter when they have come to his hands by finding, or otherwise *ib.*

Demand and refusal is evidence of a conversion, not a conversion itself 590

A personal demand is not necessary *ib.*

In what refusal case will not amount to a conversion *ib.*

Where there is no conversion proved, trover will not lie *ib.*

Demand of satisfaction or of payment for the goods, and refusal is evidence of a conversion *ib.*

Proof that plaintiff had the goods in his possession is *prima facie* evidence of property 591

In trover for goods taken at sea, what plaintiff must prove *ib.*

How the evidence in case should apply 655

12thly, In case material averments only are evidence 656

Vid. *Witness.*

How parol evidence is to be given *page* 728

Written evidence, what 731

Vid. *Record, Deeds, Statute, Fine, Verdict, Judgment, Writ, Affidavit, Chancery, Witness.*

Books of third persons, or of the party himself, how far evidence 774

A receipt not conclusive evidence 775

Bill of parcels good evidence 776

Gazette, how far it is evidence *ib.*

The rules adopted by the courts in receiving evidence 778

In every issue the affirmative must be proved *ib.*

Of what is agreed by the pleadings, no evidence need be given 779

The best evidence is always to be given, what that rule comprehends 780

Parol evidence is inadmissible to control written 781

Vid. *Copies.*

How copies may be given in evidence 784

Reputation or acting in any capacity sufficient evidence of appointment to the office *ib.*

In what case hearsay is evidence *ib.*

Vid. *Depositions, Decree, Court, Baron and Feme.*

How hearsay evidence is admitted 786

What is a good objection to its admission 787

Where parol evidence is admissible to explain written *ib.*

Evidence admissible where character is in issue 788

If the substance of an issue is proved, it is sufficient 790

Vid. *Pedigree.*

How far confession or admission may be given in evidence. Vid. *Confession.*

Examination.

Examination of persons charged with felony, how far evidence under it, 1 and 2 *Ph. & M.* 768

Excommunication.

Persons excommunicated cannot be witnesses 727

Excise.

Bills payable to the excise are allowed six days to run longer than others 60

Vid. *Officer.*

Trespass

Trespass lies against officers of the excise and customs for entering an house to search for smuggling goods if none are found *page* 395

Or if they had not a writ of assistance or a constable with them, *stat.* 13 *Car.* 2. c. 11. *ib.*

In searches by night by excise officers, there must be a constable of the place with them by *stat.* 8 *Ann.* c. 9. 79. and if no goods are found, they are trespassers *ib.*

The warrant granted by commissioners of excise is not a justification to the officer if no goods are found 396

But a condemnation of the goods in the exchequer is a complete bar to an action for taking the goods *ib.*

But this is a justification to officers only *ib.*

A condemnation of goods in an inferior jurisdiction, as by the commissioners, is not conclusive in favour of the officer *ib.*

In what cases of seizure the officer shall be justified, though the goods are not condemned 397

In suits in the exchequer, proof of payment of the duties lies on the claimant, *stat.* 6 *Geo.* 1. c. 21. *ib.*

In actions of trespass against officers of the revenue, proof of the non-payment of the duties lies on them *ib.*

Actions against officers of the revenue must be laid in the proper county, and brought within three months, *stat.* 17 *Geo.* 2. 398

In actions against officers of the excise and customs, if the judge certifies, it shall deprive the plaintiff of his costs *ib.*

How and when the certificate may be given *ib.*

In informations or actions against excise officers, the warrant under which they acted is sufficient evidence without shewing the evidence 418

Proof of their acting as officers, sufficient *ib.*

They may plead the general issue, and give the special matter in evidence 419

How far condemnation shall justify the officer 529

Trover lies against custom-house officers for seizing things not liable to

pay duty, as the wearing apparel of passengers *page* 580

When only a custom-house officer may seize contraband goods *ib.*

Execution.

Vid. *Sheriff, King, Bankrupt.*

Goods taken in execution cannot be replevied 372

Goods taken in execution must be removed within a reasonable time 393

It is not lawful to break doors to execute a writ *ib.*

This privilege is confined to the owner of the house *ib.*

Things fixed to the freehold cannot be taken in execution *ib.*

In trespass for taking things in execution what evidence is necessary where the action is by a stranger, and what where it is by the defendant in the former action 419

Stat. 8 *Ann.* c. 17. goods taken in execution cannot be removed off the premises till the landlord is paid one year's rent 613

If the sheriff has notice of the rent being due, and he removes the goods, he shall be liable in case *ib.*

The payment must by the plaintiff in the action *ib.*

And must be of the whole rent, without deduction for sheriff's fees *ib.*

The statute extends only to cases of the immediate lessor *ib.*

But extends to all cases of *fi. fa.* 614

But it is necessary that the sheriff should have notice *ib.*

The writ which is first delivered must be first executed, or the sheriff is liable in case *ib.*

Executors.

Assumpsit lies against them on a promise of the testator 121

They may maintain assumpsit on a promise made to the testator *ib.*

Executor may indorse a note 136

An executor cannot join in the same action a demand in his own right as executor 138

A promise to the testator is not admissible evidence when an executor declares on a promise made to himself 140

What

- What he may join *page* 140
 In declaring against an executor, the declaration need not state assets *ib.*
 An executor in trust may make an insurance in his own name on the life of the grantee of an annuity to his testator 64
Vid. Evidence.
 An executor may be sued on a bond of his testator's 199
 An executor is in no case chargeable in debt where the action would not lie against the testator *ib.*
 Executors not chargeable farther than they have assets, except they plead a false plea 200
 Executors may assign a term, and are not chargeable for rent after assignment 201
 The executor of a sheriff is liable for money levied by the sheriff 203
 Executor may declare against an heir on a bond of his ancestors 217
 Where the action against an executor may be in the debet, and where in the debet and detinet *ib.*
 Where the action is to be brought suggesting a *devastavit* *ib.*
 Executors may bring an action before probate, but cannot declare till after 218
 How they are to declare *ib.*
 What the declaration by the executor of an executor should state 219
 Executors may either plead or give a retainer in evidence 248
 Executor may retain where a trustee *ib.*
 An executor *de son tort* cannot retain 249
 If an executor pleads a retainer he should shew that testator made him executor *ib.*
 Which should be by making profit of the probate of the will 250
 What shall make a man executor *de son tort* *ib.*
 In what order an executor is to pay debts *ib.*
 When an executor *de son tort* should hand over the goods, in order to discharge himself *ib.*
 What shall constitute an executor *de son tort* is matter of law *ib.*
 In what case an executor shall be liable out of his own estate 251
 Not chargeable without notice 252
 What shall be considered as notice *page* 252
 Judgments not docketed rank as simple contract debts *ib.*
 In debts of the same degree, what shall create a priority of demand *ib.*
 What payments are first to be allowed to an executor 253
 In what manner he is to plead payments *ib.*
 If an executor has got a good defence, he should plead it 255
 What is an admission of assets, and what not 254
 How administration is to be granted where there are *bona notabilia* in different dioceses 255
 Where bonds are *bona notabilia*, and where debts by simple contract *ib.*
 How long administration *durante minore etate* of an administrator, and how long of an executor, shall subsist *ib.*
Plene administravit admits defendant to be executor 256
 The executor of an infant is not liable, even tho' he promise to pay a debt, unless it appear that the debt was contracted for necessities 102
 Under the plea of *ne unques executor*, what may be given in evidence 255
 How that defendant is not executor but administrator, is to be pleaded 256
 How far the inventory delivered to the spiritual court is evidence 260
 After a judgment *assets quando acciderint*, plaintiff in a future action shall not be allowed to give in evidence assets in defendant's hands at the time of the first judgment *ib.*
Plene administravit admits the debt in an action of debt, *aliter* in assumpsit *ib.*
 An executor shall not be injured by the relation to the first day of term in cases of payments made by him 262
 Upon *plene administravit* what shall be evidence *ib.*
 Upon *plene administravit*, if the jury find assets, they must find the value 263
 What covenants the executor may take advantage of 294
 By what covenants an executor or administrator is bound 295
 May be declared against either as such, or as assignee 296
 Covenants

Covenants merely personal extend only to executors or administrators *p.* 296
 Executors can only be arrested on suggesting a *devastavit* 326.

Vid. Declaration and Pleading.

Executors or administrators of tenants in fee, tail, or for life, may distrain for rent arrear by stat. 32 *Hen. 8. c.* 37. 358

Executors may maintain replevin for the goods of the testator taken in his lifetime 375

Executors shall have reasonable time to remove the goods and cattle of the testator 413

Executors may maintain ejectment for an ouster in the time of the testator 439

An executor is a good witness to prove the sanity of the testator 491

Executor of a bankrupt cannot sue out a commission 565

May have trover for a conversion of goods in testator's lifetime 578

If the wife is executrix, the husband may join in the action *ib.*

An executor *de son tort* is liable to trover at the suit of the administrator, even for goods recovered against him by a former judgment *ib.*

Trover will not lie against an executor for a conversion by the testator 357

Extent.

On *riens per discent* pleaded, the heir may give in evidence an extent on a bond owing by his ancestor to the king 247

An extent at the suit of a subject on a statute, if executed before the act of bankruptcy, though the liberate issue afterwards shall bind the goods 574

An extent at the suit of the crown shall bind the bankrupt's goods if issued any time before the assignment *ib.*

If duties are due for candles, the goods of the bankrupt are liable after the assignment *ib.*

Extents at the suit of the crown should be truly tested 514

Where an extent and a subject's execution concur, which shall have the preference 575

Extortion.

Money obtained by extortion or imposition is recoverable in assumpsit *page 41*

Money claimed for doing what it was the party's duty to do without reward is extortion, and so is not recoverable in assumpsit 92

F

Factor

May maintain an action for the price of the goods of others which he has sold 107

So he is liable for the price of goods bought by him for others *ib.*

The owner may stop the price of his goods sold by a factor in the hands of the buyer 108

In what cases the factor shall be liable to the lessor on goods of others sold by him *ib.*

How far the factor has a lien on the goods consigned to him *ib.*

He may be a witness both for buyer and seller 142

If a factor is empowered only to sell, but the goods are not delivered to him, the owner may sell them 538

When goods are bought by a factor and the possession delivered, but the principal countermands his order, if the seller agrees to take them back, he may maintain trover for them 539

The principal is not bound if the factor acts beyond the scope of his authority *ib.*

A factor can only sell the goods of his principal, he cannot pledge them *ib.*

How far the consignment of goods to a factor shall convey a property 544

Goods of a merchant in the hands of a factor, are not liable to his bankruptcy 570

In what cases of death or insolvency of a factor the merchant can follow his goods and property, and recover it *ib.*

A factor has a lien upon all goods consigned to him for the balance of a general account, or any money advanced on them 582

And

And even where he knows the merchant to be insolvent when he advances the money *page* 582

Fairs and Markets.

The king only can make a grant of fairs and markets, and create a poll 367
They may be claimed by prescription *ib.*

The claim of tolls is to be taken strictly *ib.*

Goods brought to fairs or markets to sell may be distrained for toll, but not for damage *tenant* 368

Trespass lies for erecting a stall in a fair or market without the owner's leave 389

Case lies for disturbing a person entitled to an ancient fair or market 641

But the plaintiff's market must appear to be the elder one *ib.*

If the new fair lies within seven miles, it is a disturbance for which case lies *ib.*

So if held on the same day, it is a disturbance 642

In declaring for disturbance in a fair, it is not necessary to set out a grant or prescription 653

Farmer.

Under what circumstances he may be made a bankrupt 549

Father. Vid. Parent.

Fees.

The fees due for any office or employment are recoverable in assumpsit 8

Sheriff's fees for executing writs, are recoverable by action of debt 204

How sheriff's fees are settled by stat. 29 *Eliz. c. 5.* *ib.*

To what cases the statute extends *ib.*

Felony.

Examination of persons respecting felony, how far it is evidence 768

Fences.

Case lies against the occupier of the land for not repairing his fences 638

Ferry.

A person who has an ancient ferry may have case against one who erects ano-

ther so near as to take away his custom *page* 642
The injury must be direct *ib.*

Fiction.

Fiction of reference to the first day of term shall not prevent the statute of limitations from attaching 154
Executors and administrators shall be allowed all fair payments made before the bill filed, notwithstanding the reference to the first day of term 261

Fieri Facias.

If a sheriff levies money on a *fi. fa.* and does not pay it over to the plaintiff in the action, it may be recovered in assumpsit 86

So debt will lie for it 200

And to an action of debt for it the sheriff may plead *nil debet* before he has returned the writ, but cannot when he has returned it 237

If a *fi. fa.* goes to take the goods of one person, and another's are taken, trespass will lie against the sheriff 392

The sheriff cannot break doors to execute a *fi. fa.* *ib.*

How the execution of a *fi. fa.* differs from a *levari facias* 393

A *fi. fa.* cannot be executed till the landlord is satisfied of one year's rent 613

The first writ of *fi. fa.* delivered to the sheriff must first be executed 614

How far irregular executions are valid 615

Fine.

A fine due on the admission to a copyhold estate is recoverable against an infant by action of assumpsit 170

The steward of a leet can only fine for offences committed in his view 364

For a fine or amercement in a court leet a fine by common law is incident 365

Aliter in a court baron *ib.*

An avowry for a fine need not conclude *prout patet per recordum* *ib.*

A fine imposed on many jointly is void 372

The lord cannot distrain for a fine *pro certo letæ* without a prescription *ib.*

Fine of Land.

Where an ejectment is brought for lands passed by a fine, the confession of lease, entry, and *ouster* is not sufficient *page 450*

An actual entry must be made, and must precede the demise *ib.*

Where an entry is made to avoid a fine, the action must be commenced within one year after by stat. 4 *Ann. c. 16.* *451*

What shall be a sufficient entry to avoid a fine *452*

To what estates a fine is a bar *486*

How given in evidence *ib.*

What must be proved in order to make them evidence *735*

Fishery.

How far the rights of fishery are in the king, and how far in the subject *387*

Difference of free fishery and common of fishery *388*

Free and several fishery claimable only by prescription *ib.*

An exclusive right not necessary to a several fishery *ib.*

Person possessed of a fishery cannot justify the cutting the nets, &c. of an encroacher, he should take them damage feasant *413*

Forbearance.

Forbearance, when a good consideration in assumpsit *95*

Foreign Country.

Debt or assumpsit will lie on a judgment of a foreign court of justice *197*

For injuries committed in foreign countries, an action lies in *England* *333*

A foreigner or person residing abroad, who trades with this country, may be a bankrupt *551*

*Foreign Attachment.**Vid. Attachment.**Forgery.*

Money paid to a forged instrument, or under a void authority, in what cases recoverable *3, 4*

On an indictment for forging a seaman's will, an executor named in a subsequent will cannot be a witness *page 705*

Frauds.

To what cases the clause respecting an undertaking for the debt of another extends *99, 100, 101*

Construction on the clause requiring a note in writing on agreements in consideration of marriage *100*

What shall be a sufficient signing of an instrument within the statute *103*

Construction on that clause respecting sale of lands *ib.*

On agreements not to be performed within the year *104*

Assumpsit will not lie on a fraudulent transaction *93*

Statute of frauds 29 *Car. 2. c. 3.* in what cases it requires a note in writing *148, 9*

How far goods are bound by the delivery of the writ to the sheriff under the statute of frauds *392*

*Vid. Sheriff, Fi. fa.**Freight.*

In what case it is due *113*

*G**Game.*

How far one may justify going on the land of another in pursuit of game *390*

Gamekeepers may seize guns, &c. under stat. 22 & 23 *Car. 2.* *ib.*

But they must have a warrant from a justice of the peace for the purpose *ib.*

Trespass lies for taking the gun of a gamekeeper, though not on his own manor *ib.*

Who may be a gamekeeper *ib.*

Gaming.

Wager on gaming, under what circumstances recoverable *20*

A note or bill given for money won or lent knowingly to game with, is not recoverable even in the hands of a fair indorsee *28*

Money

Money lent to game with, but without any security, is recoverable in assumpsit *page 90*

Money lost at play, if under 10*l.* may be recovered in assumpsit *ib.*

How the statute of gaming is to be pleaded to debt on a bond 223

Gaoler.

May reasonably correct his prisoners, and so justify an assault 315

Debt lies against a gaoler for an escape 204

Gazette.

How far it is evidence 776

General Issue.

Defendant under the general issue in assumpsit may go into any equitable defence 167

What defendant may give in evidence under the general issue in assumpsit 168

Gift.

Parol gift of goods gives no property, unless with possession delivered 577

Gleaning.

It is a bad justification in trespass 413

Governor.

Governor of a foreign settlement liable to an action for maliciously dismissing an officer from his place 635

Goods sold,

Vid. Assumpsit, Delivery, and Shop-book.

Guardians.

Holding over after the determination of their interest, are made trespassers by stat. 6 *Ann.* c. 18. 399

H

Habere.

Habere facias possessionem, how it shall issue in ejectment 492

Harbour.

Harbour duties, in what cases recoverable in assumpsit 10

Healib.

If any person sustains an injury in his health or constitution from the neglect of his surgeon or apothecary, case will lie for the injury *p. 601*
Or if his health is impaired from noisome smells in his neighbourhood *ib.*

Hearsay

Good evidence in matters of pedigree 738

Good evidence of the death of relations 785

Good evidence of the settlement of a pauper 787

Good evidence of what is parcel or not parcel 788

In questions of prescription *ib.*

Heir.

Liable to debt on a bond of his ancestor 199

How such bond should be declared on 216

May discharge himself by shewing that he had no assets *ib.*

Should be charged as lineal or collateral heir, according as he is *ib.*

Aliter when the declaration is by an executor or administrator 217

How the heir is to plead *riens per descendent* under stat. 3 & 4 *W. & M.* c. 14. 247

What he may give in evidence under *riens per descendent* 248

How to sue heir and devise jointly *ib.*

In what cases the heir shall be in by descent *ib.*

Heir may be declared against as assignee 290

In what cases the heir may sue on a covenant 295

The heir may recover for a damage done to the premises in his ancestor's time *ib.*

To what amount he shall recover *ib.*

If a person claims in ejectment as heir at law, he must prove a regular pedigree 467

The heir apparent may be a witness to prove a title to land, but a person in remainder cannot 489

Herald.

Herald's books are good evidence to prove a pedigree 765

Heriot.

Heriot.

An avowry for an heriot should state it as the best beast, or such *page* 370
 Difference in taking for an heriot service or heriot custom 371

History.

A general history of the kingdom is good evidence 767

Highway.

Appropriating land to an highway, the property of the soil still remains in the owner 390
 If an highway is impassable, a passenger may justify going on the adjoining land 401
Aliter of a private way *ib.*
 Ejectment will lie for land which is part of an highway 428

Hire.

If a thing hired out be lost without fault, the hirer is not liable 625

Vid. Bailment.

Hundred.

In an action against the hundred, on the stat. of *Winton*, the inhabitants may be witnesses 712
 So may the party himself 713

Hunting.

How far a person may justify going on the lands of another in pursuit of game 390

Husband and Wife.

Vid. Baron and Feme.

I

Imprisonment.

In what cases false imprisonment will lie 326
 When persons liable are not to be arrested 327
Vid. Arrest.
 When the process is void 328
 Where it is irregular or informal 329
 Or where filled up without proper authority 330

Or where the court or magistrate exceeds, or have no jurisdiction, in all these cases false imprisonment *p.* 331

False imprisonment lies for a subsequent oppression or cruelty, though the first arrest was lawful 332

False imprisonment, where the imprisonment has been by procurement of another person 333

For imprisonment in a foreign country *ib.*

All persons must be imprisoned in the common gaol *ib.*

Will not lie for taking the mariners of a ship as a prize, though the Admiralty afterwards find her not to be a prize 335

What the plaintiff can give in evidence in this action *ib.*

When this action is brought against many, they may sever in their defence 336

In justifying under process of court, what must be shewn *ib.*

What damages can be given, and how the jury may sever them 341

Indemnity.

A person induced ignorantly to act illegally by another, may recover against him on his promise to indemnify 91

What is a good plea to a bond of indemnity 232

Indictment.

If a defendant to an indictment for an assault has confessed it, he cannot afterwards plead not guilty to an action for the same assault 317

A conviction on an indictment cannot be given in evidence on an action for the same assault 320

For what indictments, if groundless, an action for malicious prosecution will lie 528

The indictment need not be found or prosecuted to support the action *ib.*

Expence alone is a good ground to support an action for malicious prosecution *ib.*

How an indictment for a conspiracy differs from an action 530

An indictment must be decided before an action will lie for preferring it 531

Where the indictment was for felony, a copy of it must be granted, in order

- der to support an action for malicious prosecution page 534
Aliter if for a misdemeanor *ib.*
 What evidence of acquittal on an indictment is necessary in an action for malicious prosecution 535
 If the indictment has been found by the grand jury, it is a sufficient justification to defendant 536
 In what cases of indictments a party interested may be a witness 711
- Infant.*
- Money paid for a debt contracted during infancy, and not for necessities, is not recoverable back in assumpsit 96
 In an action against an infant, a count in the declaration for an account stated is bad 137
 Infants during minority may bring actions by their guardians 149
 Infancy may be given in evidence under the general issue of *non assent* 161
 To what demands only infants are liable *ib.*
 What are necessities to an infant *ib.*
 What is for the benefit of an infant's estate shall be deemed necessary 162
 One cannot lend an infant money even to pay for necessities *ib.*
 An infant is not liable for goods furnished to him in the way of his trade *ib.*
 An infant not liable even for necessities, while he is *sub potestate parentis* 163
 Nor shall the father be liable to an extravagant extent *ib.*
 A tradesman is bound to inquire into the circumstances of an infant to whom he gives credit *ib.*
 May bind himself by a promise after his coming of age *ib.*
 In such case he must be charged on the simple contract 164
 Proof of nonage lies on the infant *ib.*
 An infant may bind himself by bond for necessities *ib.*
 But it must be for the exact amount, not with a penalty *ib.*
 All undertakings to an infant for his benefit are good 165
 What bonds of an infant are void, and what good 173
- How far infancy is pleadable to debt for rent page 236
 Infancy is a good plea in an action of covenant 309
 Under what circumstances an infant may maintain an ejectment 439
 The will of an infant is void unless published after full age 475
 The day of birth shall be exclusive *ib.*
 By custom an infant may make a will *ib.*
 For a debt contracted during infancy, one cannot be a bankrupt 562
 Infants, in what cases they can be witnesses 726
- Vid. Executor.*
- Innkeeper*
- Cannot as such be a bankrupt 548
 Has a lien upon goods or cattle left at his inn 584
 But only while they remain in his possession *ib.*
 Cannot sell them except by the custom of London or Exeter *ib.*
 Innkeepers liable for the goods of guests in their inns 626
 But it must be a common inn *ib.*
 The person whose goods are lost must be a traveller or guest, and received as such *ib.*
 The loss must be occasioned by the act or neglect of the innkeeper or his servants 627
 The innkeeper is only liable for goods lost while within his house *ib.*
 Where the innkeeper has no profit from the guest or his goods, he is not liable *ib.*
 It is no excuse for the innkeeper that when the goods were lost he was sick, and of nonsane memory 628
 Liable for goods or choses in action, but not personal injuries to the guest *ib.*
 Master may maintain an action for his goods lost by a servant at an inn *ib.*
 If an innkeeper refuses to admit a traveller, he is liable in an action on the case *ib.*
- Inquiry.*
- In assumpsit on a sale of goods on a writ of inquiry, defendant shall not be allowed to go into evidence of fraud in the sale 170
La

In a writ of inquiry on a promissory note or bill of exchange, what must be proved *page 170*

Bill of exchange and promissory notes are now referred to the master in K. B. and to the prothonotary in C. B. to ascertain what is due, without the intervention of a writ of inquiry *ib.*

If a party, between the obtaining of interlocutory judgment and issuing the writ of inquiry, become bankrupt, the writ may be executed in his name *ib.*

In what cases a writ of inquiry will be set aside *171*

When the defendant is a foreigner, not necessary to have a jury *per medietatem lingue* *ib.*

Vid. Costs.

What damages may be given on a protested bill of exchange on a writ of inquiry *170*

In what cases on a writ of inquiry the plaintiff shall have interest *ib.*

What notice is necessary of executing a writ of inquiry *ib.*

How the notice should be *171*

If plaintiff in replevin is nonsuited, defendant making a suggestion in nature of an avowry, shall have a writ of inquiry to ascertain the rent, damages, &c. *376*

What in such case may be recovered under a writ of inquiry *ib.*

If plaintiff is nonsuited after avowry, defendant cannot have a writ of inquiry *377*

How a writ of inquiry in replevin shall be executed *378*

Insolvent.

Note given to induce a creditor to sign a composition deed of an insolvent, is void *5. 97*

How defendant is to plead a discharge under the insolvent debtors' act *166*

What such acts usually enact *244*

How they are to be construed *245*

What debts are thereby discharged *ib.*

How to be pleaded to an action of debt *ib.*

To what the certificate is evidence *ib.*

Instalment. Vid. Bond.

Debt will not lie on a promissory note, payable by instalments, till the last

VOL. II.

day of payment be past, but assumption will *page 205*

Insurance.

What policies of insurance are good under stat. 19 G. 2. c. 37. *62*

A certain interest, though not vested in possession, is insurable *ib.*

What the insured is bound to prove in the case of a valued policy *ib.*

What shall make a policy void on the ground of want of interest *63*

Policies on foreign ships not within the statute *ib.*

What must be proved in such case *ib.*

Enemies property cannot be insured *64*

The insurance should be in direct terms *ib.*

Contingent advantages not insurable *63*

The policy must be on goods which may be lawfully exported or imported *ib.*

The policy must express the interest in direct terms *64*

What policies are good under stat. 14 Geo. 3. *ib.*

A policy on the sex of a person is void *ib.*

An executor in trust has such an interest that he may insure in his own name the life of the grantor of an annuity to his testator *ib.*

Under the terms goods, specie, and effects, the party may recover respondentia interest *65*

Re-assurance when lawful *ib.*

Double insurance what *ib.*

How a double insurer must sue *ib.*

Statute forbidding re-assurance, extends to foreign as well as British ships *66*

Premium on an illegal insurance not recoverable back again *ib.*

How policies are to be made on bottomry or respondentia under the stat. 19 Geo. 2. c. 37. *65*

It must be specified in the policy that it is bottomry or respondentia *ib.*

How policies are to be underwritten under stat. 25 Geo. 3. c. 44. *66*

What interest the insured must have at the time of the loss *ib.*

What policies on losses of slaves are good under stat. 30 & 34 Geo. 3. *ib.*

The destination of the ship must be mentioned *ib.*

E e

A a

- An insurance on goods on board a ship or ship generally, without mentioning the ship or captain's name, is good *page 66*
- In the case of gaming or wagering policies, the insured cannot recover back the premium *ib.*
- All policies made by two or more persons, though underwrote in the name of one of them, except the two corporations established by 6 Geo. 1. are void *67*
- What shall avoid a policy by matter previous to the making of the policy *ib.*
- How the representation is to be taken on a policy *ib.*
- False representation shall avoid a policy *ib.*
- The representation must be a positive assertion *ib.*
- Must be material, and at the same time false *ib.*
- How the construction of the representation is to be taken *68*
- How a warranty differs from a representation *ib.*
- How a warranty is to be taken *ib.*
- What shall be deemed a warranty *ib.*
- What shall discharge a warranty *69*
- How a warranty is to be taken as against the insured *ib.*
- How against the insurers *71*
- Meaning of sailing with convoy *70*
- How far a concealment of circumstances shall avoid a policy *71*
- What shall amount to a concealment of circumstances *72, 73*
- What circumstances the insured should make known to the underwriters *72*
- What the underwriter is bound to know *73*
- How far the course of trade shall govern the construction of policies *ib.*
- Of seaworthiness *74*
- How a policy shall be avoided by matter subsequent to the making of it *ib.*
- How far deviation shall avoid a policy *ib.*
- An intention to deviate will not avoid a policy *75*
- The policy is only discharged from the time of the deviation *ib.*
- A ship must actually proceed upon the voyage insured, being in the track of it is not sufficient *ib.*
- What deviations are lawful *page 75*
- Losses not within the letter of the policy covered by it, where the usage of trade allows it *77*
- How the act of the insured shall affect the policy *ib.*
- Of total, partial, and average losses *80*
- Constructions on the terms of policies *77, 78, 79*
- In what cases the insured may abandon *80*
- In what cases capture by the enemy shall be considered as giving the parties a right to abandon *ib.*
- At what time the loss must happen to charge the insurer *81*
- To what losses only he is liable *ib.*
- What shall discharge the insurer *82*
- By what rule losses are settled on a valued policy *ib.*
- Where losses are adjusted, what conclusive evidence against the insurer *ib.*
- What losses are within the terms of the policy *83*
- Of losses by perils of the sea *ib.*
- Of losses by capture *ib.*
- Of losses by the detention of princes or people *ib.*
- Of losses by barratry *84*
- What is barratry in the master *83*
- What is necessary to constitute barratry *ib.*
- Of apportionment and return of premium *84*
- In what cases the premium may be apportioned *84, 85*
- What proof of a loss is sufficient, and what is evidence of interest and loss *144*
- Plaintiff may declare for a total, but recover for a partial loss *169*
- Action on the case lies for not procuring an insurance *633*
- In what cases the merchant shall not be liable *634*
- How far one underwriter may be a witness for another *705*
- What is proof of interest *770*
- Interest.*
- In what cases interest shall be given in damages on a writ of inquiry *170*
- Inventory*
- Of an executor or administrator, how far it is evidence *260*

J

Joint and several.

- Of joint and several notes page 61
 In assumpsit against several, a joint debt or contract must be proved 140
 In the case of a joint and several note, payment of interest by one shall prevent the statute of limitations from running in favour of the others 152

Vid. Partners.

- Joint bonds, how they must be sued 246
 If one only is sued, he must plead in abatement *ib.*
 In bonds made to more than one, all must join in the action 247
 If there is judgment against two, and one dies, plaintiff may have execution against the other 265
 How joint and several covenants are to be construed 287
 Where joint covenants are to be taken separately 288
 In joint and several covenants, how a breach may be assigned *ib.*
 In joint and several covenants defeasance to one is a defeasance to all *ib.*
 If a battery has been done by several, the action may be brought either jointly or severally 317

Joint-tenants.

- Joint-tenants cannot devise by will during the continuance of their estate 476

*Vid. Tenant.**Journals.*

- Of the lords and commons in evidence 782—3

Judge.

- No action will lie against a judge of a court of record for any thing done in execution of his office, or for any mistake of judgment 405

Judgment.

- A judgment in one personal action is a good bar to another action for the same cause 165
 But the cause of action must be stated to be the same *ib.*
 Debt lies on a judgment of the superior court 196
 Debt will lie on a judgment for the re-

mainder of the sum recovered, after part levied page 196

- But the judgment must be entire and discharged *ib.*
 Debt lies on a judgment of a foreign court 197
 But it must not be declared upon as matter of record, but as a simple contract debt *ib.*
 Debt will lie for a sum recovered in a court baron *ib.*

How to declare in debt on a judgment 214, 215

- Nul tiel record* is the proper plea to debt on a judgment 236
 One judgment may be set off against another 240
 Goods seized under a judgment or execution, cannot be replevied 372

Vid. Replevin.

If a judgment has been vacated and restitution of goods awarded, trespass lies against the plaintiff in the action 391

Aliter if the judgment has been reversed for error *ib.*

The casual ejector cannot confess a judgment 491

Vid. Error.

- Judgment in trover must always be for damages 598
 How far evidence 739
 How given in evidence *ib.*

Jurisdiction.

A justification under a process of courts of limited jurisdiction should shew the extent of their jurisdiction 336

Justice of Peace

- May plead the general issue, and give the special matter in evidence on actions of assault 320
 What costs they shall have if the plaintiff discontinues, or is nonsuit 325
 Actions against them must be laid in the proper county 338
 No action shall be brought against him without notice, and he may tender amends *ib.*
 Action must be brought within six months after the offence done 339
 How a constable may justify under the warrant of a justice of peace 340
 How a justice of peace may plead tender of amends 206

Statute only extends to what is done
in execution of his office *page* 206

He is obliged to shew the regularity of
his proceedings *ib.*

May issue a warrant of distress and sale
within four days, by stat. 27 Geo. 2.
c. 20. 394

Shall have double costs in actions of
trespass brought against him 425

Trespass *on the case* will not lie against
a justice of peace for committing a
person to prison; it should be trespass
vi et armis 330

If a justice of peace refuses or obstructs
bail, he is liable to an action on the
case 618

So where a person is robbed, and he re-
fuses to take his depositions in order
to charge the hundred, he is in like
manner liable *ib.*

Justification.

Justification of a battery must be always
proved, and cannot be given in evi-
dence on the general issue 317

How it is to be pleaded *ib.*

Justification under returnable process,
must shew that it was returned 337

What plea in justification is good in
replevin 352

How a justification differs from an
avowry *ib.*

The sheriff may justify the taking of
goods in trespass, by shewing his
writ 411

How the officer must justify *ib.*

Plaintiff or a stranger in trespass against
them, must shew a judgment 412

Justification under courts of inferior
jurisdiction must shew the extent of
the jurisdiction, how far in the case
of an officer or a stranger *ib.*

Justification by a bailiff of an inferior
court for amercement, what it must
shew *ib.*

He who comes in aid of an officer may
justify *ib.*

What are good justifications in trespass
413, & *seq.*

If a justification is local, it should tra-
verse the place laid by the other
party 414

So where the justification varies the
manner of the traverse, it should
conclude with a traverse *ib.*

Defendant may plead two matters in
justification 416

K

King.

Replevin will not lie against the king,
nor for things taken by his authority

The king's execution shall have place
page 373
of a subject's, if his suit was com-
menced any time preceding the judg-
ment 393

The king is not bound by any of the
statutes of bankrupt 574

L

Lease.

If a lease is made by an attorney, how
it should be executed 259

The words *concessit* & *demisi* in a lease,
import a covenant in law that lessor
has a title 268

Vid. Rent.

Lessee for life or years may have tres-
pass for cutting trees growing on the
land 384

In what case lessee for years is liable in
trespass for cutting trees 400

Trespass will not lie if the trees were
spoiled by lessee's cattle *ib.*

Lease void under stat. lessee, if evicted,
cannot maintain an ejectment 456

Where the plaintiff's title in ejectment
is under an old lease and many
assignments, he need not prove all
the assignments after possession has
been long acquiesced in 459

All leases at will are now construed as
from year to year 460

How far the custom of the country shall
control that construction *ib.*

In such lease six months notice to quit
must be given *ib.*

And must end with the year 461

What form of notice is good 462

What shall be a waiver of notice 463

Where a lease is void, nothing implied
shall give it confirmation 464

Where a lease is voidable, what acts
confirm or avoid it 465

Differences in the cases of leases for
life or years 466

Lessee for years may maintain trover
for the timber of an house blown
down, though it belongs to him who
has the reversion 577

What

What things or fixtures may be removed by lessee after the determination of his term *page* 594
 Case lies against lessee for obstructing him in reversion from coming on the lands to see waste 650

Ledger.

Ledger-book of the ordinary, in what cases it is evidence 761

Legacy.

Assumpsit lies against an executor or administrator for a legacy, if he has assets and has himself promised 86
 A legacy left to a bankrupt after his certificate signed by his creditors, and the commissioners, but before its allowance by the chancellor, belongs to the assignees 119

Letters.

The postmaster is obliged to deliver letters within the limits of the post-town 623
 Postmasters-general are not carriers within the custom, so as to be subject to losses of bills, &c. out of letters 624
 Letters written not evidence when the party can himself be called 780

Lewari Facias.

Vid. *Fieri Facias.*

Libel.

The rules as to slanderous words, apply to libels 504
 What publications shall not be deemed libels 505
 The names of persons need not be set out at length 506
 How libels against the dead are punished 507
 What writings of public evil tendency are actionable 508
 A fair report in a newspaper of what passed in court on a cause, is not a libel *ib.*
 A fair comment in a newspaper on any public amusement, or any public performer, is not a libel 509
 Nor will an action lie by the proprietors of a place of public amusement on the ground that a performer, being libelled, was thereby prevented from appearing *ib.*

Censures passed by sectaries on persons of their own sect, not libels *page* 508
 Rules adopted by the courts in granting information for libels 509
 It is essential to a libel that it be published *ib.*
 But writing a libel is sufficient 510
 Selling a libel in a shop is a sufficient publication *ib.*
 How a libel may be published *ib.*
 What is a libel *sine scriptis*, and how it must be proved 511

Vid. *Declaration, Plea, Evidence, Slander, Verdict, Judgment and Costs.*

Liberty.

How the sheriff is to proceed to make replevin in a liberty 349
 If a bailiff of a liberty brings a prisoner out of his liberty, it is an escape 608
 For an escape from a bailiff of a liberty the sheriff is not answerable *ib.*

Lien.

A factor has a lien on goods consigned to him for the balance of a general account 108
 For repairs done to a ship in *England*, there is no lien against the ship 111
 Where a party has a lien by law on goods, he is not liable to an action of trover 581
 In what cases liens are allowed 582
 A factor has a lien on goods consigned to him for the balance of a general account, or for money advanced *ib.*
 Bankers have a lien on bills, &c. for the balance of a general account *ib.*
 So has a wharfinger on goods brought to his wharf *ib.*
 Manufacturers have only a lien for the work done to the goods themselves *ib.*
 But the usage of trade may give a general lien *ib.*
 A pawn gives of itself a lien 583
 But not beyond the pawner's interest *ib.*
 An innkeeper has a lien on the horses for goods brought to his inn 584
 But he cannot sell. Vid. *Innkeeper.*
 Carriers have a lien on goods for their hire *ib.*
 But a carrier or warehouse-man has no lien for booking or warehouse-room, if they have been removed by the owner immediately from the waggon 585

An attorney has a lien on the papers of his client page 585
 But a clerk in court has not *ib.*
 Liens are only admitted for the benefit of trade *ib.*
 Wherever there is an agreement to pay, there is no lien *ib.*

Lights.

Case lies for obstructing them 635
 Vid. *Nuisance.*

Limitations, Statute of.

The statute of limitations must always be pleaded in assumpsit 147
 Six years is the limitation of actions of assumpsit 148
 Against what demands it runs *ib.*
 Accounts current among merchants, how far accepted *ib.*
 How far the rights of infants, femes covert, persons insane, or beyond seas, are saved 149
 Where the action is joint, if any of the partners reside in England, the statute will attach *ib.*
 Plaintiff is not barred by reason of his own, or of the defendant's absence beyond seas *ib.*
 What shall be deemed absence beyond seas *ib.*
 How far an executor is bound by the statute 150
 Where money has been paid under a mistake, or for a consideration which happens to fail when the statute begins to run *ib.*
 What shall prevent the statute from attaching 151
 What kind of promise or acknowledgment of the debt shall prevent the statute from being a bar *ib.*
 Suing out what process shall prevent the statute 152
 How the process must be continued 154
 Plaintiff shall not be barred by any fiction of reference to the first day of term *ib.*
 To prove the suing out of a writ in order to prevent the statute from attaching, the writ itself must be produced 155
 In case of judgment being arrested or reversed, plaintiff may bring a new action within the year 156
 Where the cause of action arises from an executory contract, how the statute is to be pleaded *ib.*

Twenty years non-payment of interest is a limitation to a bond page 226
 This plea should be taken strictly *ib.*
 What shall prevent the limitations from taking place 227
 The statute of limitation extends not to debt reserved by indenture 236
 Nor to debt on matters of record *ib.*
 A debt barred by the statute of limitations cannot be set off 239
 The statute may be given in evidence on *nil debet* pleaded to debt for rent 262
 Actions of assault must be sued within four years 319
 So must actions of false imprisonment 338
 Actions against justices of the peace and constables must be brought within six months after the offence 339
 Actions of replevin must be brought within six years, stat. 21 Jac. 1. c. 16. 353
 Actions against officers of the revenue must be brought within three months 397
 Actions of trespass must be brought within six years, stat. 21 Jac. 1. c. 16. 416
 No entry can be made but within twenty years, stat. 21 Jac. and so no ejectment maintained 432

Vid. Ejectment.

In the case of a fine, five years is a complete bar 450
 How the saving of the rights of infants, &c. have been construed *ib.*
 An actual entry is necessary to prevent the running of the statute of limitations 431
 And where an entry has been made, an action must be commenced within one year, stat. 4 Ann. c. 16. *ib.*
 Action for slander must be commenced within two years, stat. 21 Jac. 1. c. 16. 519
 Extends not to *scandal. magnatum* *ib.*
 Nor where the special damage is the gist of the action, nor when the action is for slander of title *ib.*
 Debt barred by the statute of limitations good to support a commission of bankrupt 563
 Actions of trover must be brought within six years 595
 From what time the statute begins to run *ib.*
 In this plea the day of suing out the writ should be shewn *ib.*

Limit

Livery Stable.

A livery stable keeper has no lien on horses, as an innkeeper has *page* 584

Loan.

If goods or living things be lent, they must be used to the purpose for which they were lent; or if lost, the person shall be liable 626

London.

By the custom of *London*, a married woman who trades is suable as a feme sole 129
A feme sole can only sue in the courts of the city of *London*, not in the courts above under custom 200
She cannot give a bond and warrant of attorney *ib.*
By the custom, simple contract debts from one trader to another rank as specialty 253
An apprentice may be assigned in *London*, but the assignee cannot maintain covenant on the indenture of apprenticeship 294
Feme covert trading separately from her husband, by the custom of *London*, may be a bankrupt 551
Copies of the city books evidence as to boundaries 783

Lottery.

Bills and money embezzled by a clerk and paid away in illegal insurances in the lottery, may be recovered in assumpsit by the master 6
Money paid for illegal insurance in the lottery, in what cases recoverable *ib.*
If a lottery-office keeper pays money on account of an illegal policy in the lottery, he shall not be allowed to recover it back 7
How a party should declare under the lottery act 139

Lunatic

Is liable in trespass for injuries to the lands or property of another 399
Committee of a lunatic cannot make leases, nor maintain ejectment 438
What defect of understanding shall incapacitate a man from making a will 476

M

Malicious Persecution

Will not lie for a groundless civil action *page* 525
Unless for suing out a writ without any cause of action, or for the purpose of holding one to excessive bail *ib.*
Of if a stranger sues out a writ without the privity of the real creditor 526
Malicious prosecution lies for suing a person in a court not possessing jurisdiction, knowingly *ib.*
But the court must want original jurisdiction *ib.*
So it will lie if the action is brought in the proper court without any ground, and that known to plaintiff himself 527
So for suing in the spiritual court without giving the party notice *ib.*
Any groundless proceeding shall be a foundation of this action *ib.*
But the first suit must be decided before this action will lie *ib.*
For maliciously preferring an information or indictment, this action will lie 528
For what indictment it will lie *ib.*
Though the indictment is bad or found *ignoramus*, this action will lie *ib.*
So expence alone will support it *ib.*
Malice and want of a probable cause must concur to support this action 529

But one may be inferred from the other *ib.*
What is a probable cause is matter for the court to decide on, not for the jury *ib.*

Vid. Conspiracy, Declaration, Plea.

In malicious prosecution for an indictment for felony, the court must grant a copy of the indictment, which must be given in evidence 534
But where the indictment was for a misdemeanor it is not necessary *ib.*

*Vid. Evidence and Damages.**Mandamus.*

For what the court will grant a mandamus 661
For what the court will not grant a mandamus 66

- In what cases the court will not grant a mandamus in the first instance *page* 696
- In applying for a mandamus what the party must shew to the court, in order to entitle him 669
- In what cases the court will grant a concurrent mandamus 671
- To whom the writ is to be directed 672
- What the body of the writ should contain 674
- Of the service of the mandamus 675
- Vid. Corporation.*
- Who should make the return of a mandamus 681
- What the return should contain, and what is a good one 682
- When the return should be made 685
- How to proceed in case of a false return *ib.*
- How under stat. 9 *Ann. c. 20.* 686
- Manor.*
- Ejectment will lie for a manor 428
- How to be brought *ib.*
- Lord of a manor may have trover for an estray, or for wreck before the year and day expired 577
- Vid. Custom.*
- Manufacturers*
- Have no lien for work done, except on the goods themselves 582
- But the usage of trade may give a general lien *ib.*
- Market.*
- Where stallage and pickage are due in markets and fairs 389
- Trespass lies for erecting a stall in a market without leave of the owner of the soil *ib.*
- Every shop in *London* is a market overt for the sale of goods which are the trade of that shop 594
- Vid. Fair.*
- Marriage.*
- What promises in consideration of marriage are within the statute of frauds 102
- Bonds in restraint of marriage are void 183
- Bonds given to procure a marriage, or in the nature of marriage-brokers bonds, are void *page* 184
- Bond conditioning to marry, or in the disjunctive, when suable 210
- What marriages only are good under the marriage act, stat. 26 *Geo. 2. c. 33.* 481
- This act does not extend to marriages in *Scotland* *ib.*
- Nor the clause respecting persons under age *ib.*
- How far cohabitation is evidence *ib.*
- Sentence of divorce in a jactitation-suit, conclusive evidence *ib.*
- How far the clause respecting witnesses shall affect the marriage 482
- Vid. Bastard.*
- How far the sentence of the ecclesiastical court is sufficient evidence in cases of marriage 75
- Master and Servant.*
- How far the master is liable for debts contracted by his servant 114
- The servant is not liable for debts for goods furnished on account of the master *ib.*
- The master not liable where he has given money to the servant who has misapplied it 115
- A master cannot justify an assault in defence of his servant 314
- A master may reasonably correct his servant or apprentice 315
- How a servant must plead to an assault in defence of his master 316
- Trover lies against the master for goods delivered to a servant in the way of his trade 580
- So it will lie against the servant himself *ib.*
- The master is liable to an action on the case for an injury done by his servant *ib.*
- But it must be a negligent or involuntary act, not a wilful one 600
- Case will not lie against a steward or manager unless he has himself done the act *ib.*
- Case lies for inveigling away the servant of another 646
- But the person must have notice that he was his servant *ib.*
- Though

Though the servant left his place, the action equally lies *ib.*

A journeyman is a servant so as to subject the party to an action *ib.*

What shall exempt the second master from an action at the suit of the first 646

A public performer is not a servant of that description that an action will lie at the suit of the master for beating him *ib.*

Where a servant is bound to serve under a penalty, if the penalty is recovered no other action lies *ib.*

For any injury to a servant by which the master loses the benefit of his labour, an action will lie *ib.*

In actions against the master for injuries done by the servant, he is an inadmissible witness without a release 657

Aliter where the action is by the master for an injury done to the servant 650

Vid. Declaration in Case.

Mayhem.

What is a mayhem 312

Mayhem may be justified by an officer executing the sentence of a court martial 314

Cannot be justified by a small assault 315

Under what circumstances of mayhem the court will increase the damages on a view 322

Meadow.

Covenant not to plough meadow, how constructed 279

How to use the land in a husbandlike manner *ib.*

Merchant.

How far merchants accounts current are within the statute of limitations 151

Mill.

If a person is entitled by prescription to have all the corn of a manor ground at his mill, case lies for carrying it elsewhere 646

But setting up a new mill or school near another is not actionable, though it draws away the business of the old 642

Misrecital

Of a statute, where it is the ground of the action, is fatal *page* 134

Of a lease or demise, is fatal 222

In covenant, misrecital of the estate on which the covenant is placed is error 369

Money.

Money lent and advanced, how it is to be declared on 134

In case of a tender, it must be paid into court 159

In a general action of covenant, money cannot be paid into court 310

Vid. Payment.

Mortgage.

Mortgagee is not suable as assignee where he has never been in possession 292

Though the mortgagor has been in possession for twenty years, yet may the mortgagee maintain ejectment 435

In what cases of ejectment by the mortgagee notice is necessary, and in what not necessary *ib.*

Assignee or mortgagee may maintain ejectment 436

In ejectment by mortgagee, the court will stay proceedings on payment of principal, interest, and costs *ib.*

Second mortgagee, who has the title-deeds, may maintain ejectment on the first mortgagee *ib.*

But where the mortgage has been granted under illegal circumstances, the defendant may avail himself of it *ib.*

Mortgagee who had never been in possession cannot be admitted as a defendant in ejectment 453

An old mortgage-deed whereon interest has not been paid for twenty years, shall not nonsuit the plaintiff in ejectment who claims under the mortgagor 457

Vid. Ejectment.

If a trader mortgages his effects, and if the mortgagee suffers the mortgagor to remain in possession, the mortgage shall be void as against creditor 566

Vid. Bankrupt.

Mortmain.

Mortmain.

Devises of land in mortmain are void
page 477
 May be good as appointments to charitable uses *ib.*
 What restrictions are now put on such devises by stat. 9 Geo. 2. *ib.*

N

Navy.

Treasurer of the navy, who has paid a seaman's wages to a forged administration, is not liable to pay it again to the real administrator 3
 Officers in the army or navy not liable to an action for removing their inferior officers from commands 635

New Assignment.

Vid. *Pleading and Replication.*

Nil Debet.

Nil debet cannot be pleaded to debt on bond 225
 May be pleaded to debt for rent 233
 Payment of the last gale of rents discharges all former ones, and is evidence under *nil debet* 234
 Levied by distress is also good evidence under it *ib.*
 Where a sheriff has levied money on a *fi. fa.* but not returned the writ, he may plead *nil debet*; *aliter* if he has returned the writ 237

Nil habuit in Tenementis

Cannot be pleaded to debt reserved on a deed 232
 Nor any thing tantamount to *nil hab. in tenem.* be given in evidence under *nil debet* 233
 Cannot be pleaded to an action covenant, nor any thing tantamount to it 306

Nomine Pænæ.

A distress for a *nomine pænæ* cannot be made without a demand 350
 If the defendant avows for a *nomine pænæ*, though the plaintiff be barred, defendant shall not have costs and damages 376

Non est factum.

Under what circumstances it may be pleaded to debt on a bond *page 223*
 May be pleaded to debt for rent 234
 May be pleaded to an action of covenant 306
 But under it lessor's title cannot be impeached *ib.*

Non dimisit.

Cannot be pleaded to debt for rent reserved by indenture 233

Nonsuit.

Where there are two defendants and judgment by default against one, the plaintiff cannot be nonsuited 168
 Costs of a nonsuit recoverable in debt 215

Vid. *Replevin and Avowry.*

In replevin there can be no judgment as in the case of a nonsuit 378

*Notes. Vid. Bills.**Nudum Pactum.*

Ex nudo pacto non oritur actio 94
 What shall be deemed *nudum pactum* 95

Notice.

Notice to quit necessary in leases at will 460

Vid. *Lease.**Nuisance.*

Case lies for darkening and obstructing the lights of an ancient messuage 635
 But the house must be an ancient one 636
 If an house has been 20 years erected, its lights cannot be obstructed *ib.*
 No contrary prescription to stop the lights is admissible *ib.*
 Case will not lie for obstructing a prospect *ib.*
 To obstruct the lights of houses adjoining the street, is a nuisance *ib.*
 For the continuance of a nuisance, case will lie 637
 In what cases an action for a nuisance will lie against lessee or assignee where the nuisance was before their time *ib.*
 Either

Either lessee or he in reversion may have an action for a nuisance to an house *page 637*

For overhanging and dropping on an house, an action lies for the nuisance *ib.*

So for infecting it with bad smells *ib.*

Erecting a smelting-house, the vapour of which destroys the grass, is a nuisance to the land, for which case lies *638*

So it will lie for suffering a ditch to be foul, that it overflows his neighbour's land *ib.*

So for diverting a watercourse *ib.*

So for suffering such a nuisance of conies on a man's land, that they go on that of his neighbour, and spoil it *ib.*

So for not keeping fences in repair *ib.*

Case lies against a parson for not taking away his tithe. *Vid. Tithes. 639*

Where a nuisance has been continued, the continuance must be specially declared on *653*

O

Office.

The title to an office may be tried by an action of assumpsit *86*

The fees of an office may be recovered in assumpsit *ib.*

But they must be the known and accustomed fees *ib.*

Assumpsit founded on a contract for the sale of an office is void *90*

Bonds given for the sale of offices are void *179*

How far such bonds may be good *ib.*

Where certain powers or rights belong to an office, they cannot be limited or confined by the bond *185*

If a person entitled to an office with fees and is disturbed in it, he may have case for the disturbance *643*

What he must shew *644*

If a person is candidate for an office, and the returning officer refuses him a poll, he may have case for the injury *647*

And he need not aver that he would have been elected *ib.*

In actions for disturbance of an office, it is sufficient to shew the value *communibus annis 659*

Officer.

Officers of the excise and customs, in what cases liable to refund money wrongfully paid to them *p. 112. 128*

Excise officers are entitled to a month's notice of any action to be brought against them for any thing done in the execution of their office *319*

The three months within which actions must be brought against excise officers, are reckoned from the time of the seizure *398*

Officers of the army or navy may justify under the sentence of a court martial to an action of assault *314*

The commanding officers in the army or navy may put any of their inferior officers into confinement *335*

But for using such power cruelly or oppressively, an action of false imprisonment will lie *332*

Vid. Navy.

Officers executing the process of courts which have no jurisdiction, are trespassers *391*

Aliter where the court has jurisdiction, but it does not extend to the person or place *392*

If goods are taken under an irregular judgment, trespass will not lie against the officer, though it will against the plaintiff in the action *ib.*

If a sheriff's officer takes the goods of a stranger in execution *a fieri facias*, trespass will lie against the sheriff *ib.*

Vid. Sheriff, Excise, Court.

Trespass will not lie against a mere ministerial officer for what is done in pursuance of his duty *399*

In trespass against a sheriff or other officer for taking goods, they need only shew their writ without shewing a judgment *411*

So they must shew the process returned, if it is returnable *ib.*

How officers are to justify under mesne or final process of inferior courts *412*

A private person may justify as coming in aid of an officer *ib.*

Officers of the army and navy not liable to action for putting their inferior officers in arrest, where no malice appears *529*

Officers

Officers in the several courts have not a right to turn out their clerks at pleasure without any fault page 529

Overseer.

Promise made by an overseer of the poor for curing a pauper, good 96
 Overseers of the poor are officers within stat. 24 Geo. 2. c. 44. 340
 Shall have double costs in actions against them, where the plaintiff is nonsuited or discontinues 325

P

Paraphernalia.

If the husband devises away the wife's paraphernalia from her, the executors may maintain trover for them against her 578
 But if he dies intestate, or does not dispose of them by will, the wife shall have them *ib.*

Parent and Child.

A parent may justify an assault in defence of his child 315
 Father may have an action for getting his daughter with child 645
 She must be at the time resident in her father's house *ib.*
 But she need not be under the age of 21 years *ib.*
 Father cannot have an action for the battery of his son, by which he has lost an opportunity of marrying him 640
 But he may, with a *per quod servitium amisit* *ib.*

Parson.

Parson may recover against his predecessor for dilapidations 85
 When a parson gives a title to ordination, he is bound to maintain the person to whom he gives it *ib.*

Vid. Tithes.

Parliament. Vid. Election.

Partner.

Partner may accept a bill on the joint account 44

Where a balance of accounts is struck on the dissolution of a partnership, assumpsit will lie page 94

What is necessary to constitute a partnership 115

There should be a concern in the sale, as well as purchase of things bought together 116. 118

The advantage to be derived from the trade must be *casual*, in order to make a person a partner, if the advantage is certain, and defined he is not so *ib.*

If money is lent or entrusted to one partner, and he brings it into the partnership fund with the knowledge of the other partners, all are liable 117

How partners should sue and be sued 116

In what cases one partner may be sued without the rest, and in what cases he may sue 117

Where one partner dies, the survivor may sue alone, as the executor cannot join 118

Where an action is brought against one partner without joining the other, he must plead in abatement *ib.*

One partner may execute an instrument in the presence of the other, and by his authority, and it shall bind both 224

A debt due to one as surviving partner may be set off to an action for a debt in his own right, and *vice versa* 239

How to take advantage of the improperly suing a partner 117

Execution may be sued out against one partner for a debt due by the partnership 118

If one partner is out of the kingdom, he need not be joined *ib.*

How partners should declare in assumpsit 137

Where a person relies on the faith of several partners, though one only is concerned, all shall be charged 141

A commission of bankrupt may issue against one partner for a debt due by the partnership 565

In the case of partners, one may make any disposition of the partnership's effects, not subject to be controlled by the bankruptcy of the other *ib.*

In actions *ex delicto* it is not necessary to sue all the partners; *aliter* in actions *ex contractu* 623

Partij.

Party.

No one can maintain assumpsit on an agreement to which he is not a party
page 106

Exception where the undertaking is to the father for the benefit of a child
ib.

No one can sue on an indenture to which he is not a party 297

Difference in the case of a deed-poll *ib.*

Who shall be deemed a party to a deed, and who not *ib.*

Patron.

Patron of a living, what bonds he may take not simoniacal 181

Patent.

Case lies for infringing a patent 648

What the patentee must shew as to the specification, in order to support his patent on the action brought *ib.*

If the invention is new in England, though known before abroad, yet may the patent be good 649

Pawn and Pawnbrokers.

Pawnbroker may be a bankrupt 547

Pawning is no sale in market overt 379

It gives a lien on the things pawned, but not greater than the interest of the person pawning 583

Pawnee is not liable for goods lost without any fault in him 624

Aliter if he refuses to deliver the things when the money has been tendered 625

In what cases the pawnee may use the pawn, and in what not *ib.*

Payment.

What payments by or to a bankrupt are good after a secret act of bankruptcy 119, 120

How payment is to be pleaded in assumpsit 149

How defendant is to pay money into court in an action of assumpsit 159

How defendant may plead payment of a bond before or after the day, under stat. 4 & 5 Ann. 225

He who pays money shall have a right to direct to what it shall be applied 229

Difference in this respect between law and equity page 228

How the fund out of which the payment is made shall direct its appropriation 229

In covenant, money cannot be paid into court 310

Pedigree.

A bill in Chancery filed by an ancestor good evidence of a pedigree 752

Hearsay good evidence 785

*Vid. Heir.**Peer.*

Where the principal becomes a peer, so that he cannot be surrendered by his bail, an *exoneretur* shall be entered on the bail-piece 195

Penalty.

Where a covenant is secured by a penalty, debt or covenant lies on it 279

Difference where the penalty is as a compensation, or *in terrorem* 280

In debt on a bond for performance of covenants, the jury shall assess the damages for each breach *ib.*

Where there is a judgment on demurrer, how the judgment shall be 281

Performance.

How to be pleaded in covenant 372

Perjury.

Persons convicted of it cannot be witnesses 723

Evidence on an indictment for perjury 768

Pew.

The right to sit in a pew of a church arises either from prescription or from a faculty from the ordinary 643

Case lies for disturbing a person so entitled in the enjoyment of the pew *ib.*

How plaintiff must in such case make out his title against a disturber *ib.*

Difference where the action is against the ordinary, and where against a wrong-doer *ib.*

Uninterrupted possession for sixty years does not give a title *ib.*

Place.

Place.

Bonds given for the sale of a place,
not recoverable in law page 186

*Pleading.**Vid. Declaration.**1st, In Assumpsit.*

Where there is a special contract or
agreement, the plaintiff should de-
clare on it 129

Where something previously is to be
done by plaintiff, what he shall aver
130. 132

In what cases an averment of notice
and request is necessary 131

When the action is on mutual pro-
mises, they must be both made at
the same time, and if both to
be performed at the same time,
plaintiff need not aver performance
132

When a precedent act is to be done by
plaintiff, he should aver, and shew
his right to do such act, and his per-
formance as far as he could *ib.*

If plaintiff aver performance, he must
shew how he performed *ib.*

Plaintiff in assumpsit should shew *for*
what the debt became due *ib.*

In indebitatus assumpsit for money
lent, it must be stated to be for mo-
ney lent to defendant himself 134

The breach assigned should always fol-
low the undertaking stated *ib.*

If party is bound to do any thing *on*
or before such day, it is good to
state that he did not do it *on* the day
ib.

If a statute is the ground of an action,
and plaintiff undertakes to recite it,
any misrecital is fatal *ib.*

The day of the promise laid in the de-
claration is not material 135

When the day makes part of the con-
tract, assigning a different day in the
replication is a departure 136

On an *insimul computasset* the time and
place should be laid *ib.*

How to state the acceptance in declar-
ing on a bill of exchange *ib.*

How in the case of an executor *ib.*

Not necessary to shew any note in
writing in the declaration, in de-
claring on the statute of frauds 137

Wrong to lay an account stated in an
action against an infant page 137

How a surviving partner should declare
ib.

How an assignee of a bankrupt should
declare *ib.*

How an executor *ib.*

The plea in assumpsit should answer to
the promise laid in the declaration,
and to every part of it 146

How defendant should plead where
the promise is to arise on an ex-
ecutory consideration *ib.*

Matters of law that do not go to the
gist of the action must be pleaded
147

What matter must always be pleaded,
and what may be given in evidence
under the general issue *ib.*

That defendant indorsed over a pro-
missory note, and that plaintiff ac-
cepted it for an account of his debt,
is a good plea in assumpsit 167

*Vid. Accord, Action, Administrator, At-
tachment, Alienage, Bankrupt, Bond,
General Issue, Infancy, Insolvent,
Judgment, Limitation, Payment, Re-
lease and Award, Use and Occupa-
tion.*

The defendant in assumpsit cannot
plead inconsistent pleas, such as non
assumpsit and a tender 168

zdy, In Debt.

No parol averment varying the condi-
tion of a bond can be pleaded in bar
221

In what case obligor may plead that it
was delivered conditionally, or as an
escrow 222

Defendant may plead that the condi-
tion is illegal 223

What pleas defendant may plead dou-
ble under the statute 233

*Vid. Accord, Attachment, Entry, Li-
mitation, Insolvent, Nil habuit in Ti-
numentum, Non dimisit, Nil debet, Nil
tiel record, Riens en arriere, Retainer,
Office, Set-off, Release.*

3dly, In Covenant.

How performance is to be pleaded 305

A covenant in one indenture cannot be
pleaded in bar to a covenant in an-
other *ib.*

Aliter where they are the same *ib.*
indenture *ib.*

What

What double pleas under the statute
may be pleaded page 309

Vid. *Accord, Bankrupt, Distress, Entry,
Infancy, Nil habuit in Tenementum,
Tender and Release.*

4thly, *In Assault.*

A justification in assault must always
be pleaded 317

How a servant must justify in defence
of his master 318

How in assault husband and wife are to
plead *ib.*

How a former recovery of damages is
to be pleaded 319

How to justify under a writ to the
sheriff *ib.*

Place cannot be traversed *ib.*

Vid. *Limitations.*

5thly, *In false Imprisonment.*

If the action is brought against an of-
ficer and another, they may sever in
their defence 336

How to justify under process of courts
of inferior jurisdiction *ib.*

How to justify under process returnable
or not 337

The place not traversable *ib.*

Vid. *Limitation, Justice of Peace and
Constable, Abatement.*

1st, *In Replevin.*

Under the plea of *non cepit* in replevin,
the property cannot be contested 350

Plea of *non cepit* confines the taking to
the place in the declaration 351

In pleading prescription, the whole of
it must be set out 362

2d, *In Trespass.*

How the defendant is to plead where
the trespass is transitory, and where
local 410

Where a person has been indicted for a
trespass, and confessed it, he cannot
after plead not guilty to an action
for the same offence 411

If defendant has a good justification in
trespass, he must plead it, and can-
not give it in evidence on the gene-
ral issue *ib.*

What defendant may give evidence on
not guilty pleaded *ib.*

In actions against the sheriff or other
officer who plead a justification, he
must shew the writ *ib.*

But in an action against the plaintiff,
in that action he must shew a judg-
ment as well as the writ page 412

Vid. *Justification, Accord, Release, Dis-
claimer, Limitation.*

In trespass against several, if damages
are recovered against one, it may be
pleaded in bar to an action against
the other for the same trespass 425

3d, *In Ejectment.*

How ancient demesne is to be pleaded 454

Entry into part of the lands after issue
joined, is a good plea in ejectment *ib.*

Accord and satisfaction is a good plea *ib.*

4th, *In Slander.*

What are good pleas in justification for
slandorous words 517

How far it is in a justification that de-
fendant heard them from another *ib.*

The truth of the words is a good plea,
but must always be pleaded 518

A recovery in damages in a former ac-
tion for the same words, is a good
plea 519

Accord and satisfaction is a good plea *ib.*

So is the statute of limitations *ib.*

5th, *In Malicious Prosecution.*

The plea should shew a probable cause 533

Should shew the special matter and
need not traverse the *false & mali-
tiosè* 534

6th, *In Trover.*

No plea in trover but a release and
the general issue 592

Bankruptcy is a bad plea to an action
of trover *ib.*

A recovery in a former action of trover
or trespass is a good plea 593

Several pleas in justification 593 & *seq.*

7th, *In Case.*

Under not guilty pleaded, defendant
may give a justification in evidence *ib.*

In actions for escape, the marshal or
warden must plead specially a re-
caption on fresh suit by statute
8 & 9 W. 3. *ib.*

And the special plea must be accompa-
nied with an affidavit that the escape
was without his knowledge, con-
trivance, or consent *ib.*

Pledge.

Pledge.

Money lent is recoverable in assumpsit, though the party has taken a pledge for his security 86
Vid. Replevin, Sheriff, Pawn.

Policy.

Contracts against the policy of the law cannot be supported 92
 Bonds given for contracts contrary to good policy, are void 182
Vid. Insurance.

Poll-Books.

Poll-books at an election, copy of them is evidence 783

Poor.

If defendant avows for poor rates, and plaintiff is nonsuited, the defendant may have a writ of inquiry to ascertain the damages 378
 For any irregularity in the warrant, &c. or disposition of the distresses for poor rates, the officer shall not be deemed a trespasser, stat. 17 G. 2. c. 98. 382
Averia caruæ are distrainable for poor rates *ib.*
 Where a penalty is given to the poor, the inhabitants may be witnesses 712
 In actions for money mispent by the churchwardens or overseers of the poor, the parishioners may be witnesses *ib.*

Ports and Quays.

Vid. Toll and Prescription.

Possession.

Possession alone gives a good title to maintain an action of trespass 403
 For twenty years good in ejectment *ib.*

Postmaster

Must deliver letters within the limits of the post-town 623
 Postmaster-general not liable for bills or notes lost out of letters put into the post-office 624

Prescription.

Good and lawful prescription must be shewn by a commoner to justify a

9

distress for damage feasant for the common *page 362*

Inhabitants, as such, cannot prescribe *ib.*

Commoner must set out the whole of the prescription *ib.*

The whole prescription as set out must be proved *ib.*

What shall be deemed the whole of the prescription 363

A copyholder must prescribe against a stranger through the lord, but against the lord himself by way of usage 364

Toll-thorough cannot be claimed by prescription alone 366

Aliter of toll traverse *ib.*

Great strictness is required in shewing a right to toll by prescription 367

Tolls in fairs and markets may be claimed by prescription *ib.*

Such prescription is taken strictly *ib.*

How far toll in ports and quays can be claimed by prescription 368

Prescription for toll should be for a sum certain 370

Right of free fishery may be claimed by prescription 388

In prescribing for an easement, how to plead 655

Presumption.

If no interest has been paid on a bond for twenty years, it shall be presumed to be satisfied 226

What shall obviate the presumption *ib.*

Prison.

The keeper of any prison shall if required give a true note in writing, acknowledging a person in his custody to be so, under penalty of 50*l.* stat. 8 & 9 W. 3. c. 27. 608

Prize.

Where a ship has been captured as prize, false imprisonment will not lie by the mariners against the captors 335

Trespass will not lie against master of a king's ship or privateer for taking a vessel as prize which turns out not to be liable to capture 401

Probate.

Executor may bring actions before probate, but cannot declare till after 218

If

If the probate is lost, the exemplification is good evidence *page* 218
 Where there are *bona notabilia* in different places, how administration is to be granted 255
 Where bonds are *bona notabilia*, and where notes and debts *ib.*
 What probate is void, and what is voidable *ib.*
 Probate, how far evidence 761

Process.

If there is a justification under process, it must shew that it was returned 337

Profert.

Where an executor or administrator indorses a bill or note, indorsee is not called on for profert of the letters of administration 136
 In declaring on a bond, profert must always be made 207
 Within what time *ib.*
 Where a deed is lost by time and accident, the plaintiff may declare specially without profert *ib.*
 In declaring as assignee of the sheriff, no profert of the assignment is necessary 213
 In declaring in covenant, a profert is always necessary 298

Promissory Note.

Vid. *Bills of Exchange.*

Property.

He who has a special property in goods may maintain trover 403
 A man may take his own goods wherever he finds them 413

Proviso.

Where there is a proviso in a deed defeating a covenant, it need not be set out in the declaration, but defendant be left to plead it 300
Aliter, where it is an exception, and part of the covenant *ib.*

Q

Quaker.

In what cases a quaker's affirmation is admissible, and when not 729
 VOL. II.

Quiet Enjoyment.

To what evictions this covenant extends *page* 273
 In what cases against the act of a stranger 274
 How the breach to be assigned *ib.*
 What disturbance is a breach of this covenant 275
 Who are persons claiming under others *ib.*

Quo Warranto.

Vid. *Corporation.*

How to apply to the court of K. B. for a quo warranto 697
 What are the rules laid down by the court in granting it 698
 What are the subsequent proceedings 701
 What costs are given *ib.*

R

Rasure

Shall avoid a deed, in what cases 224. 252

Receipt.

Receipt not conclusive evidence 775

Receiver

Under the court of Chancery may give notice to a tenant to quit, and so subject the tenant to an action for double rent 188

Recital.

Covenant will lie on the recital in a deed 268

Recognizance.

Debt lies on a recognizance made in pursuance of stat. 23 H. 6. or where taken in Chancery 198
 If a recognizance is payable at several days after the first day of payment, conusee may have execution 205
 In declaring on a recognizance, any variance is fatal 215
 How recognizance in C. B. and K. B. differ *ib.*
 For recognizance of bail, vid. *Bail.*

Record.

On what matters of record debt lies 204
 F f Where

- Where a record is to be truly alleged *page* 214
- How the declaration is to conclude on matters of record 215
- Of the pleas to matters of record 237
- Records conclusive evidence 741
- Records tried only by themselves *ib.*
- In what case tried by a jury *ib.*
- Records given in evidence by an exemplification or by a copy 742
- What shall be good proof, and what a failure of record 744
- A variance in setting out a record in a part not material, is not fatal; *aliter* in a part material *ib.*
- Records how exemplified 745
- Different kinds of exemplifications 746
- Vid. Copy.*
- Recovery.*
- How far a recovery is a bar in ejectment 486
- What proof required of the surrender of the tenant for life 487
- Provisions respecting recoveries under stat. 14 G. 2. c. 20. *ib.*
- How given in evidence 735
- Rectory.*
- In an ejectment for a rectory what must be proved 458
- Proof of payment of tithes is not sufficient *ib.*
- Institution is not sufficient proof of presentation *ib.*
- Register.*
- Register of marriages, christenings, &c. is good evidence 764
- Register of marriages in the Fleet not evidence *ib.*
- Copy of the register of a foreign chapel not evidence *ib.*
- Register of the navy-office good evidence 766
- Release.*
- Where a release is a good plea in assumpsit 167
- May be given in evidence under the general issue *ib.*
- A promise before it is broken may be released by parol, but afterwards can only be released by deed *ib.*
- How a release of all actions shall operate 246
- How a release of all demands in actions of debt *page* 246
- In the case of joint bonds, a release to one is a release to all 244
- Covenant not to sue shall not operate as a release *ib.*
- A release must always be pleaded *ib.*
- What release to bail shall be good *ib.*
- What release shall discharge a covenant, and what not 307
- How a release must be pleaded *ib.*
- At what time a covenant may be released *ib.*
- Release is a good plea in trespass, and how it must be pleaded 415
- In joint trespasses, a release to one is a release to all *ib.*
- A release restores the competency of an interested witness 716
- Religion.*
- How far religious tenets incapacitate a witness 726
- How persons of different religions are sworn *ib.*
- Rent*
- Recoverable in an action for use and occupation 20
- Rent due to tenant for life who dies before it is payable, shall be apportioned and recoverable by his executors or administrators 21
- The case is the same of tenant in tail 22
- Rent is recoverable against an infant while in possession 162
- Arrears of a freehold rent were not recoverable at common law 187
- How recoverable under stat. 32 H. 8. c. 37. *ib.*
- Baron may have debt for arrearages during the lifetime of feme in her right 188
- Rent payable by tenant for years, at will, or at sufferance, recoverable by action of debt *ib.*
- Tenant after notice to quit shall forfeit double rent *ib.*
- Who may give notice *ib.*
- How notice is to be given *ib.*
- What notice is sufficient *ib.*
- On what holding the action may be maintained 189
- Tenants not giving notice to their landlords of ejectments served on them, forfeit treble rent *ib.*
- Debt

- Debt lies against lessee for years even after assignment *page* 201
 Unless the lessor discharges him by accepting rent from the assignee *ib.*
 Lessor cannot have debt for rent if he grants away the reversion *ib.*
 How to declare in debt for rent 211
 The lease should be truly recited 212
 Where debt for rent must be brought *ib.*
 What pleas are good in debt for rent 233
 Acceptance of rent due at a later day, discharges all prior arrears 234
 A bond given for rent arrear shall not be deemed a payment or discharge 235
 A *fortiori*, if a note of hand is given *ib.*
 How rent shall be barred by the stat. of limitations 236
 Rent reserved by parol shall rank as a specialty in the distribution of estates by executors or administrators 251
 In debt for rent and *nil debet* pleaded, stat. of limitations and entry, and eviction may be given in evidence 262
 What words shall create a covenant for payment of rent 267
 Covenant for payment of rent is not discharged, though the premises are burnt, and so lessee has no enjoyment of them 279
 Covenant to pay rent not discharged though the premises burned down 273
 Nor by the bankruptcy of the lessee 291
 Where covenant for non-payment of rent must be brought 304
 In covenant for rent, if the sum is misstated, plaintiff shall recover what is really due 310
 Vid. *Lease, Assignee, Baron and Feme, Use and Occupation.*
 A release restores the competency of an interested witness 716
 At common law, he who had the fealty could distrain for rent 355
 Difference of rents service, rents charge, and rents seck *ib.*
 All rents may now be distrained for, by stat. 4 Geo. 2. c. 26. 356
 A distress should be made for the entire rent which was due *ib.*
 That the plaintiff paid the ground-rent to the original landlord is a good replication *page* 374
 For ejectment for non-payment of rent, vid. *Ejectment.*
 Acceptance of rent is not of itself a waiver of the notice to quit 463
 Except under stat. 4 Geo. 2. c. 28. *ib.*
 Where an execution goes against a person, the landlord shall be satisfied a year's rent before the removal of the goods off the premises, by stat. 9 Ann.
 Vid. *Execution, Fieri Facias, Tenant in Common, and Sheriff.*
 Repairs.
 Where expended in repairs may be pleaded in bar to debt for rent 234
 Covenant to leave in repair, does not extend to natural decay 277
 In what case an action will lie on it before the end of the lease, and in what case not *ib.*
 To what things covenant to repair extends *ib.*
 Extends to assignee 289
 And to administrator *ib.*
 Under a covenant to repair, the heir may have covenant, though not named 295
 May recover for an injury in the time of the ancestor *ib.*
 What damages should be given on the covenant to repair 310
 Replevin.
 Proceedings in replevin are either by writ or plaint 346
 How to proceed by plaint *ib.*
 Before the replevin granted, the party must find *plegii de retorno habendo* & *de prosequendo* 347
 How they may be taken *ib.*
 Cannot be money or cattle *ib.*
 Sheriff or his officer, how liable for taking insufficient pledges 318
 The sheriff should take a bond in two sureties on making replevin, stat. 1 Geo. 2. c. 19. 348
 The court will not grant an attachment against a sheriff for taking an insufficient replevin bond *ib.*
 To what amount in such case shall be recovered against the sheriff *ib.*
 F f 2 How

How to make replevin within a liberty
page 349
How to proceed by plaint after replevin made *ib.*
How the proceedings may be removed by *pone* or *recordari* *ib.*
What must be done before the suing out of such writs *ib.*
How the declaration should be 350
Vid. Declaration, Abatement, Plea, Limitation, Justification, and Avowry.
If defendant claims a property in the goods, how the sheriff must proceed 351
Replevin will not lie for things taken beyond sea 372
Nor for charters, nor for things condemned, nor against the king, nor where there is no property 373
Several persons cannot join in avowry 374
If defendant in replevin has judgment, he can only have return of the things, or cattle avowed for 375
Tenants in common cannot avow together *ib.*
So one tenant in common cannot avow alone, he should make cognizance as bailiff to his companion *ib.*
For damages and costs in replevin, *vid. Costs.*
What the jury should find 379
In what case there shall be a return irrepleviable 377
Of the writ of second deliverance 379

Replication.

In debt on specialty the plaintiff in his replication can only alledge new matter in the specialty declared on after setting it out on oyer 211
Where the day is material and defendant pleads son assault, plaintiff should now assign 317
It is a good plea in bar to an avowry for rent arrear on an under-lease, that defendant paid the ground rent to the original landlord 374
How plaintiff should plead that cattle escaped from a highway through defect of fences *ib.*
The replication in trespass must traverse one matter in particular 408
But the issue need not consist of a single point 409

Where plaintiff declares on his possession, it is sufficient to traverse the defendant's title in his replication without setting out any title in himself page 409
Plaintiff in his replication may state a day different from that laid in the declaration *ib.*
How plaintiff may reply to the plea that the place is defendant's freehold 410
In what case is plaintiff put to his new assignment *ib.*

Rescue.

How far it will justify a battery, and how 314
In case of an arrest on *mesne process*, a rescue shall excuse the sheriff in the case of an escape 610
But if the party is once within the walls of the prison, nothing but a rescue by the king's enemies, or fire, shall excuse him *ib.*
Wherever the sheriff has time to prepare the *posse comitatus*, he shall not be excused in case of rescue *ib.*
In an action for a rescue, what the party must prove 657
What may be given in evidence to increase or mitigate the damages 659
Party rescued may be a witness *ib.*
For rescous of a distress, treble damages and costs are given by stat. 2 W. & M. s. 1. c. 5. 660

Respondentia.

Respondentia interest how to be insured 65

Retainer

May be given in evidence on *non assumpsit* 167
An executor may retain either for a demand in his own right, or as a trustee 248
An executor *de son tort* cannot retain 249
No person can retain the goods of another for any demand where there has been a special agreement to pay 585

*Return.**Vid. Election.*

The sheriff is liable to an action for a false return 616

Cafe will lie for making no return *p.* 616
 An executor may have cafe for a false
 return in *vita testatoris* *ib.*

What returns are void 391

The sheriff cannot be called on to make
 a return of a writ, after being six
 months out of office 617

How the six months are to be reckoned
ib.

The sheriff must be required to make
 his return by rule of court *ib.*

In an action for a false return of a *fi.*
fa. what plaintiff must prove 657

In an action for a false return, the bai-
 liff is an inadmissible witness 659

Reversion.

Grantee may maintain covenant under
stat. 32 H. 8. 34. 293

Revenue.

Vid. Officers.

Reward.

Debt lies against the sheriff for the re-
 ward given by statute for the convic-
 tion of coiners 203

The reward given by statute for ap-
 prehending felons, does not incapa-
 citate the person entitled from being
 a witness 713

Riens en Arriere

Is a good plea to debt for rent 235

S

Sailors.

In what cases they shall lose their
 wages, and when recover them 113

Same case of privateers *ib.*

Vid. Ship.

Sales, Vid. Auction.

Assumpsit on sales may be either at the
 suit of the vendor or vendee 11

Money paid on a sale is recoverable
 back again in assumpsit, if the title
 of the thing is defective *ib.*

And though the thing sold may consist
 of several lots, the vendor must make
 a complete title to the *whole* of it,
 if from the nature of the contract it
 is entire, for making a good title to
 part is not sufficient *ib.*

But the deposit only is recoverable with
 interest, not damages for the loss of
 the bargain *page 11*

But the vendee shall recover all ex-
 pences incurred in consequence of
 the vendor's misrepresentation as
 for conveyances, &c. *ib.*

But the goods sold must be returned
 before the action will lie 12

The contract of sale must be at an end
ib.

And it must be rescinded by the party
 that means to sue for the money paid
 in a *reasonable time*, as otherwise he
 must sue on the special contract and
 recover damages for the breach of it
ib.

If the contract is not at an end the plain-
 tiff should declare on the warranty
 or special agreement, as assumpsit
 for money had and received will not
 lie 13

In declaring on the warranty, the thing
 need not be returned, nor notice
 given to the seller of the defect *ib.*

When a purchase is made, if the money
 is paid and the thing contracted for is
 not delivered, assumpsit lies to re-
 cover back the purchase money
ib.

When the bargain is made, as the
 property of the goods is transferred
 to the vendee, and that of the price
 to the vendor, the vendor may main-
 tain assumpsit for the price even be-
 fore delivery of the goods, if the sale
 has been a good one 14

If goods are lost before delivery, who
 shall bear the loss *ib.*

What contracts are good under the sta-
 tute of frauds *ib.*

No parol agreement for the sale of
 goods above the value of 10*l.* is
 good or binding on the parties un-
 less there is earnest or delivery given
ib.

Things which are bespoke and to be
 delivered after, require no earnest or
 note in writing *ib.*

The doctrine that the statute of frauds
 does not extend to contracts execu-
 tory has been held to be confined to
 cases where some work was to be
 done to the thing sold 15

And that where the thing sold is capa-
 ble of immediate delivery and is not
 delivered, it is within the statute
ib.

- Goods sold at auctions are not within the statute of frauds *page* 14
- Goods sold by a broker are not within the statute, as he is to be considered as the agent for both buyer and seller, and the sale-note, a note in writing within the statute *ib.*
- How far earnest binds the bargain 15
- Deposit when forfeited 16
- In a writ of inquiry on the sale of goods, fraud in the sale is not admissible evidence 170
- If the seller of goods takes notes without agreeing to run the risk of them, and they turn out to be bad, he may avoid the sale 538
- Where the sale is *bona fide*, though possession is not given, vendee may maintain trover *ib.*
- If a factor is impowered to sell, but the goods are not delivered, the owner may sell them *ib.*
- What shall amount to a rescinding of the contract on the part of the seller *ib.*
- If a sheriff takes goods in execution, he may sell them without a *venditioni exponas* after he goes out of office 539
- If stolen goods are sold, they shall be restored to the owner on his procuring evidence against the felon *ib.*
- After conviction the owner may have trover for them 340
- But trover will not lie against the person who bought the stolen goods but sold to them to another before conviction *ib.*
- The owner is only entitled to have his goods where the prosecution has been for felony, not for fraud, &c. 540
- Fraudulent and pretended sale to defraud creditors, are void under stat. 13 *Eliz. c. 5.* 540
- All such are void, unless possession follows the deed *ib.*
- And even then if only a colourable possession, or if there is no consideration *ib.*
- Except where the deed of sale is only conditional, or the want of immediate possession is consistent with the deed 541
- Does not extend to *bona fide* creditors *ib.*
- Assignment of all a man's effects only void in the case of bankrupts 540
- Sales or assignments of ships at sea are good without possession delivered 542
- Pretended sale of part of the bankrupt's estates, an act of bankruptcy *p.* 560
- What shall be a good sale in market overt 579
- For what deceit in sales of things of certain value case will lie 629
- Lies on a warranty of the value or quality of the things sold *ib.*
- The master is liable on the warranty of his servant 630
- How a warranty must be made *ib.*
- In what case an action will lie on a warranty without a return or notice 631
- Case will lie for selling a thing not the seller's own *ib.*
- If the seller is out of possession, the action will not lie 632
- Salvage.*
- The person saving goods has a lien on them for salvage 583
- Scire Facias.*
- There must be 15 days between the teste and return of the *sci. fa.* 194
- Cannot issue against the bail till *non est inventus* returned to the *ca. fa.* against the principal 170
- Notice required in executing a *scire fieri* writ of inquiry *ib.*
- A *scire facias* will lie against a sheriff where he has levied at the suit of the plaintiff in the action 203
- Sea.*
- Persons beyond sea, how far barred by the statute of limitations 149
- To whom that clause of the statute extends *ib.*
- Goods taken beyond sea cannot be replevied 372
- Services and Suits, Vid. Heriot and Custom.*
- Secretary of State*
- Cannot issue general warrants to seize 419
- May commit on suspicion, in what cases *ib.*
- Sentence*
- Of the court of admiralty is good evidence on a trial at law 168
- Servants.*

Servants.

For non-payment of a servant's wages,
a party cannot be arrested by a
justice's warrant *page* 334

Vid. Master.

Set-off.

If a person who is entitled to retain
money by way of set-off, pay it by
mistake, he can recover it back
on assumpsit 2

In assumpsit against assignees on an or-
der for a dividend, they cannot
plead a set-off 121

When a set-off was first given, and how
it is to be pleaded 238

What debt only can be set-off *ib.*

Must be certain and liquidated *ib.*

Must be good and subsisting when the
action is brought 239

Must be due in the same right *ib.*

Money recovered by judgment may be
set-off 240

But not to the full extent, till the at-
torney is paid 241

Set-off may be pleaded to an action
on an annuity-bond *ib.*

Bail-bonds cannot, unless they have
been assigned 239

How notice of a set-off should be given
241

How far a set-off is allowed in cases of
bankrupts *ib.*

What debts may be set-off in the case
of bankrupts 242

In what cases only a set-off is plead-
able 243

How it is to be pleaded *ib.*

Sheriff.

Money levied by the sheriff on a *fi. fa.*
and not paid over to plaintiff, is re-
coverable in assumpsit 86

Bonds limiting the extent of the un-
der-sheriff's office are void 184

Bonds to the sheriff for fees are void
191

Debt lies to recover money which he
has levied but not paid over 203

Or when he has returned that he has
seized goods which were rescued *ib.*

So it lies against the executor of the
sheriff *ib.*

Debt lies against a sheriff for the re-
ward given by stat. 6 & 7 *W. &*
M. on the conviction of coiners 203

Debt lies against the sheriff for an escape
page 203

Debt lies for his fees 204

Sheriff's fees how to be levied, and on
what execution *ib.*

What the sheriff may plead to actions
against him 237

False imprisonment lies against a sheriff
for not discharging a defendant whom
plaintiff had ordered to be discharged
333

How he is to proceed in replevin un-
der the stat. of *Marlbridge* 346

Is liable for insufficient pledges in re-
plevin 348

Trespass lies against a sheriff for his
officers taking the goods of a stranger
in executing a *fi. fa.* 392

Under the statute of frauds goods are
bound from the delivery of the writ
to the sheriff *ib.*

Statute only relates to goods in the
hands of purchasers, not of executors
ib.

Goods are not bound in the case of a
bankruptcy 392

The sheriff shall not be made a tres-
passer by relation 393

The statute does not extend to the king
ib.

But until the execution executed, the
owner may dispose of his goods in
market *overs* *ib.*

The sheriff cannot break doors to exe-
cute a writ *ib.*

In an action against a sheriff or his offi-
cers for taking goods of a stranger,
the copy of the judgment must be
given in evidence *ib.*

Aliter where the action is by the de-
fendant in the original action *ib.*

The sheriff may have trespass for goods
which he had seized under a *fi. fa.*
and which had been taken away
403

The sheriff may justify in trespass by
only shewing his writ without shew-
ing a judgment 411

Sheriff may sell goods seized without a
venditioni exponas after he goes out
of office 288

The sheriff may maintain trover for
goods seized by him under a *fi. fa.*
577

The sheriff under an execution cannot
deliver the specific goods to the
plaintiff, but must sell them 594

F f 4 Where

- Where the sheriff is acting in his judicial capacity, no action lies against him *page* 594
- Where an action is brought against both sheriffs and one dies, the action survives against the other 603
- Actions for *torts* may be brought either against the sheriff or his officers, but for neglect of duty against the sheriff only 595
- Vid. Escape, Return, Execution.*
- How far sheriffs are liable in case of escapes 606
- For an escape out of either of the counters, the action shall be brought against both the sheriffs 610
- The sheriff may have an action against the person escaping, though he himself has not been sued 612
- Is liable to an action on the case for removing goods under an execution without paying the landlord a year's rent 613
- So he is in like manner liable for executing the writ first which has been last delivered to him 614
- Sheriff is liable to an action in the case of a false return 615
- Vid. Return.*
- Ship.*
- If a ship has been repaired, but is burnt in dock, assumpsit lies for the repairs 86
- In what extent the master of a ship may bind his owners 110
- How far the owners are liable under stat. 7. G. 2. *ib.*
- There is no lien against the body of a ship for repairs done in *England* 111
- A person who repairs a ship may sue either master or owners *ib.*
- In what case the master shall not be liable 112
- What ownership shall subject the party *ib.*
- How far a mortgagee is considered as owner *ib.*
- How far sailors are entitled to wages when absent from the ship, or disabled 113
- How sailors wages are to be regulated by the ship's earnings *ib.*
- Sales or assignments of ships at sea are good with out possession delivered 542
- The assignment of ships at sea is good within the stat. 21 *Jac.* 1. in the case of bankruptcy is not void, as against creditors *page* 565
- There is no lien against a ship for repairs done to her in *England* 583
- Neither has the master any lien on her for money expended, or for wages *ib.*
- If one of the owners of a ship sends her on her voyage without consent of the others, he is liable if she is lost 580
- Ship owners are only liable for the loss of gold, diamonds, &c. to the value of the ship and cargo, stat. 7 *Geo.* 2. c. 15. 624
- Though a ship is hired out, the owner is still liable 111
- Simony.*
- Bonds given on a simoniacal agreement are void 180
- What is simony, and what not *ib.*
- What bonds are not simoniacal *ib.*
- Slander.*
- Different kinds of slander 496
- What words are of themselves actionable *ib.*
- The words must charge some fact committed *ib.*
- How far adjective words are actionable 497
- Words charging a man with any thing that may subject him to prosecution, are actionable *ib.*
- Words must be taken with reference to the subject matter in allusion to which they are spoken 498
- Words charging a fact which could not happen, are not actionable *ib.*
- What words operating to exclude a man from society are actionable *ib.*
- Words injurious and applicable to a man in his trade or profession, are actionable *ib.*
- What words spoken in derogation of a man in office are actionable 499
- Words are actionable when so applied which would not be so in the case of a common person *ib.*
- But words of opinion are not actionable 500
- Difference where words are applied to a person in an office of profit or of credit only *ib.*
- How*

How *scandalum magnatum* is punishable
page 500

What words injuring a man in his pre-
ferment or inheritance are actionable

501

What words inducing loss of trade or
business are actionable *ib.*

How far a *colloquium* must appear 502

How words causing a loss of marriage
are actionable *ib.*

How words causing a loss of service *ib.*

Words actionable may not be so, if
spoken in friendship 503

Or if spoken in confidence *ib.*

For words used in the course of legal
proceedings, no action will lie *ib.*

Aliter if crimes are charged not cog-
nizable in the court applied *ib.*

A joint action for words will not lie *ib.*

Rules adopted by the courts in their
construction of scandalous words 511

Vid. *Libel*.

All the words of a sentence must be
taken together 511

The meaning is not liable to be strained
ib.

The words must be a charge of slan-
derous nature 512

The person slandered must be certain
ib.

Vid. *Declaration, Plea, Verdict, Costs,*
and Evidence.

Smuggling.

In what cases contracts arising from
smuggling can be supported 91

Vid. *Excise*.

A person who dealt only in smuggled
goods may be a bankrupt 547

Society.

Trover will not lie against one member
of an amicable society by another for
taking the box containing the sub-
scriptions 586

Soldier.

Examination of a soldier as to his fet-
tlement, evidence 783

Solvit ad Diem.

How to be pleaded 225

Where no interest has been paid on a
bond for twenty years, under the

plea, it shall be left to the jury to
presume the bond satisfied page 226

What shall be deemed payment under
this plea 227

Specialty.

Assumpsit will not lie when the debt is
due by specialty 96

But it may on a promise to pay the con-
tents of a bond to an assignee *ib.*

In the declaration in assumpsit, it should
appear that the debt was not due by
specialty 134

Stable-Keeper.

Livery stable-keepers cannot detain a
horse for his keep as innkeepers 584

Stage-Coach.

The owner not a carrier within the
custom 622

Not answerable for things above 5 l.
value, when 422

Stamps.

Each instrument given in evidence must
be stamped J 776

If the amount of the duty is paid, it is
sufficient 777

Every instrument must now have the
appropriate stamp *ib.*

Any alteration in an instrument re-
quiring a stamp makes a new stamp
necessary 778

Vid. *Agreements.*

Though parol evidence be sufficient,
yet if the same evidence is offered in
writing, it must be stamped 777

Stamped papers cannot be used again *ib.*

How far copies of legal proceedings
should be stamped 778

Statutes.

What statutes are public and what pri-
vate 732

How differently taken notice of by the
court 733

How far a proviso in a statute is to be
taken notice of 734

Title of a statute no part of the law 735

General acts of parliament how given
in evidence 749

How private acts

Statutes quoted.

Stat. of West. 2. c. 2. 347

————— 379

Stat.

<i>Stat. of West.</i> 2. c. 2.	page 654	22 & 23 <i>Car.</i> 2. c. 9.	page 421
———— c. 46.	<i>ib.</i>	———— c. 26.	390
<i>Statute of Marlbridge</i>	346, 349	———— c. 9.	324
2 <i>Rich.</i> 2.	234	———— c. 11.	10
4 <i>Edw.</i> 4. c. 6.	144	29 <i>Car.</i> 2. c. 5.	14
17 <i>Edw.</i> 2. c. 9.	196	———— c. 3.	99
25 <i>Edw.</i> 3. c. 2.	439	———— c. 17.	567 & 477
5 <i>Hen.</i> 4. c. 20.	333	3 & 4 <i>W. & M.</i> c. 14.	375
23 <i>Hen.</i> 6. c. 10.	190	———— c. 11.	247
4 <i>Hen.</i> 7. c. 21.	486	4 & 5 <i>W. & M.</i> c. 23.	712
11 <i>Hen.</i> 7. c. 20.	431	7 & 8 <i>Wm.</i> 3. c. 7.	425
14 <i>Hen.</i> 8.	331	8 & 9 <i>Wm.</i> 3. c. 11.	439
21 <i>Hen.</i> 8. c. 11.	439	———— c. 27.	425, 378, 597, 493
23 <i>Hen.</i> 8. c. 6.	190	8 & 9 <i>W. & M.</i> c. 10.	219, 360
27 <i>Hen.</i> 8. c. 10.	431	9 & 10 <i>W. & M.</i> c. 3.	608, 612, 654
32 <i>Hen.</i> 8. c. 28.	296	———— c. 17.	324
———— c. 34.	293	3 & 4 <i>Ann.</i> c. 9.	41
———— c. 37.	187	4 & 5 <i>Ann.</i> c. 16.	49, 50
———— c. 13.	85, 299	5 <i>Ann.</i> c. 9.	22, 41, 53
———— c. 19.	375	7 <i>Ann.</i> c. 12.	150, 191, 225, 264
———— c. 1.	195	———— c. 5.	457
———— c. 7.	428	8 <i>Ann.</i> c. 9.	374
———— c. 28.	431	———— c. 17.	560
———— c. 36.	486	———— c. 14.	439
———— c. 37.	358	9 <i>Ann.</i> c. 14.	395
33 <i>Hen.</i> 8. c. 39.	393	———— c. 20.	613, 564
34 & 35 <i>Hen.</i> 8. c. 4.	552	———— c. 25.	188
1 & 2 <i>Pb. & M.</i> 12.	400	10 <i>Ann.</i> c. 19.	19, 90, 179
5 & 6 <i>Edw.</i> 6. c. 16.	179	12 <i>Ann.</i> c. 16.	686
13 <i>Eliz.</i> c. 5.	541	3 <i>Geo.</i> 1. c. 15.	390
———— c. 7.	431, 545	6 <i>Geo.</i> 1. c. 21.	79
———— c. 11.	306, 307, 309	10 <i>Geo.</i> 1. c. 10.	175
43 <i>Eliz.</i> c. 4.	198	11 <i>Geo.</i> 1. c. 4.	378
———— c. 6.	421	12 <i>Geo.</i> 1. c. 28.	397
29 <i>Eliz.</i> c. 4.	204	———— c. 29.	<i>ib.</i>
31 <i>Fl.</i> c. 6.	180	2 <i>Geo.</i> 2. c. 22.	663
43 <i>El.</i> c. 6.	171	———— c. 23.	81
1 <i>Jac.</i> 1. c. 15.	552, 557	4 <i>Geo.</i> 2. c. 2.	189
1 <i>Jac.</i> 1. c. 15.	331 & 119	———— c. 28.	238
3 <i>Jac.</i> 1. c. 7.	8	———— c. 4.	8
4 <i>Jac.</i> 1. c. 3.	425	5 <i>Geo.</i> 2. c. 30.	429
7 <i>Jac.</i> 1. c. 5.	<i>ib.</i>	———— c. 3.	188
————	320	———— c. 16.	17, 147
————	325	———— c. 36.	439
———— c. 12.	142	11 <i>Geo.</i> 2. c. 19.	591, 561
21 <i>Jac.</i> 1. c. 3.	648	———— c. 34.	158
———— c. 16.	416, 512, 955	14 <i>Geo.</i> 2. c. 20.	241
———— c. 19.	231, 546, 567	17 <i>Geo.</i> 2. c. 38.	241
———— c. 12.	426	19 <i>Geo.</i> 2. c. 2.	110
————	325	19 <i>Geo.</i> 2. c. 37.	238
————	338		712
21 <i>Jac.</i> 1. c. 16.	461		477
————	236		340, 350, 381, 443
————	338		20
————	423		188
13 & 14 <i>Car.</i> 2. c. 11.	395		487
16 & 17 <i>Car.</i> 2. c. 8.	491		382, 397
17 <i>Car.</i> 2. c. 9.	377		65, 120
			62, 65
			19 <i>Geo.</i>

19 Geo. 2. c. 37.	page 63
19 Geo. 2. c. 34.	340
21 Geo. 2. c. 37.	617
22 Geo. 2. c. 40.	10
24 Geo. 2. c. 40.	4, 338

—	c. 44.	416
—	c. 24.	390
25 Geo. 2.	c. 6.	473
26 Geo. 2.	c. 3.	341
—	c. 33.	481
27 Geo. 2.	c. 20.	394
4 Geo. 3.	c. 33.	561
12 Geo. 3.	c. 36.	6
14 Geo. 3.	c. 48.	17, 64
15 Geo. 3.	c. 51.	28
17 Geo. 3.	c. 26.	2

17 Geo. 3. c. 30.	28, 33
c. 46.	139
19 Geo. 3. c. 44.	398
25 Geo. 3. c. 44.	66
27 Geo. 3. c. 29.	712
32 Geo. 3. c. 58.	700
If a statute is the ground of an action, and is misrecited, it is fatal	134

Statute Merchant, or Staple.

Debt lies on a statute merchant or staple	198
Sheriff's fees are not due on executing a statute merchant or staple	205
Tenant by statute merchant or staple, may maintain covenant	293

Stock.

Stock jobbing transactions, in what cases money recoverable	6
Stock in any of the public funds is not recoverable in an action for money had and received	99
Bonds given for differences of stock, in what cases good	138

Stolen Goods.

Vid. Sales.

Surety.

Debt lies against a surety in a bail-
bond at the suit of the sheriff 205

Surgeon.

If a surgeon or apothecary undertakes a cure, and the party suffers in his health by his neglect, case will lie for it. 601

page 63 What shall be deemed to be neglect
340 page 601

Surrender.

4, 33 ⁸	How it shall discharge the bail	194
	When it must be made	<i>ib.</i>

Survey.

Survey of the king's ports is good evi-	
dence	764
Survey from the first fruits office good	
evidence	766

Survivor.

Vid. Partner.

T

Tax.

Covenant to pay taxes, how far the land-tax is within it	278
A wager on the amount of the taxes not recoverable	18
An imprisonment cannot be justified under the general printed warrant	334

Tenants.

Tenants holding over after notice to quit forfeit double rent	203
What notice is good	ib.
One tenant in common may sue for his share of the whole rent	117
One tenant in common may have an action for double rent or value for his moiety	189
An action will lie against a tenant for not using the land in a husbandlike manner, though there is no covenant to that effect	279
Tenants in common should join in an action for a nuisance	639
Tenant in common should join in covenant	297
How tenants in common should avow	374

Vid. Rent.

Tenants *pur auter vie* and for life, may
distrain under stat. 32 H. 8. c. 37. 359

Tenants in common should not join in
an avowry 375

Tenants 375

- Tenants by custom may have their way-going crops, and leave them on the premises *page* 386
- Tenants *pur auter vie* holding over after the determination of their estates, are trespassers 399
- Tenants in common should join in action of trespass for injuries which concern their lands held in common 404
- The possession of one joint-tenant shall prevent the statute from running to bar the rest 434
- One tenant in common must make an actual ouster, or he cannot have ejectment against the other *ib.*
- What shall be deemed an actual ouster *ib.*
- In ejectments by tenants in common, an entry by one is good for all *ib.*
- Tenants in common cannot join in a lease to bring ejectment 448
- There must be a distinct count on the demise of each 449
- But joint-tenants may join *ib.*
- In ejectment by one tenant in common against another, confession of lease, entry, and ouster is sufficient 451
- Vid. Lease.*
- One tenant in common may have trespass against the other for the mesne profits 495
- One tenant in common, joint-tenant, or parcener, cannot have trover against his companion 586
- Except one destroys the things held in common *ib.*
- Tenant may at the expiration of his lease carry away things fixed there for the benefit of his trade, as blocks, vats, &c. so marble chimney-pieces, &c. 594
- An action for not repairing fences must be brought against the tenant in possession, unless the landlord is bound to repair *ib.*
- Tender.*
- Pleading a tender to an action brought for goods delivered to a third person, will take the case out of the stat. of frauds 102
- Must always be so pleaded in assumpsit, where the party admits the money to be due 159
- Defendant cannot plead non assumpsit to the whole, and a tender as to part *page* 159
- Where it can be pleaded after an im- parlance, and where not *ib.*
- When *tout temps prist* is necessary to be pleaded 160
- Tender is pleadable to a *quantum meruit* *ib.*
- How plaintiff should reply to a plea of tender & *semper paratus* where there is no certain time in the promise for payment *ib.*
- In what manner a tender is to be pleaded where the parties meet, and where not *ib.*
- At what time of the day a tender should be made *ib.*
- How an administrator should plead a tender *ib.*
- Of paying money into court *ib.*
- What is a good tender 161
- Tender and refusal at a subsequent day cannot be pleaded to a bond under stat. 4 & 5 *Ann.* 225
- Tender and refusal, how to be pleaded in covenant 318
- Vid. Money.*
- How far pleadable in replevin 373
- Terrier.*
- An old terrier is good evidence of a boundary in ejectment 488
- A terrier of glebe is only good evidence when signed by the parson and churchwardens *ib.*
- In what case it is not good evidence 766
- Ticket.*
- The value of a masquerade or other ticket recoverable in assumpsit 86
- Tithes.*
- Covenant on a lease of tithes extends to assignees 293
- Ejectment lies for tithes 428
- In ejectment for them the declaration should state the nature of them, as hay, &c. 448
- So it should state the demise to have been by deed *ib.*
- Case lies against a parson or impropriator for not taking away his tithes 638
- But the tithes must be set out 639
- Notice

Notice of the setting out of the tithes,
in what cases it is necessary *page* 639

Toll.

How toll-thorough and toll-traverse
differ 366
Toll-thorough must be claimed under
a good consideration *ib.*
And all matters must be shewn *ib.*
Tolls in fairs and markets, how granted
367
May be claimed by prescription *ib.*
How far a grant of a fair or market
shall give the right of toll *ib.*
The claim is to be taken strictly *ib.*
How far tenants in ancient demesne
are excused 368
How tolls for landing at ports or quays
are to be claimed *ib.*
Such toll may be claimed by prescrip-
tion 369
User of the port is necessary *ib.*
The toll claimed must be a sum certain
370
In a justification of a seizing for toll,
what the party should shew *ib.*

Trade.

Contracts by an infant for goods to
carry on trade are void 162
Bonds in restraint of trade generally
are void 183
What bonds may be good *ib.*
Liens upon goods is confined to cases
for the benefit of trade *ib.*

Vid. Master and Servant.

Trespass.

Every entry on the land of another is
a trespass 380
In what cases it is excusable *ib.*
Where the entry is lawful, a subse-
quent abuse shall make a man tres-
passer *ab initio* 381

Vid. Distress.

Trespass must be voluntary, and with
some degree of fault 383
Mistake shall not excuse a trespass *ib.*
Both property and possession are neces-
sary in order to maintain this action
ib.
Lessee for life or years may have tres-
pass for cutting trees on the land
384

Trespass will lie for taking the emble-
ments where the party is not enti-
tled to them *page* 386

Vid. Lease and Emblements.

Trespass lies for things damage feasant
ib.
How far taking the things damage
feasant shall discharge the action 387
Trespass lies for fishing in the fishery
of another *ib.*

Vid. Fishery.

Trespass lies for toll 389
Vid. Toll.

Trespass lies for raising stands in fairs
or markets *ib.*

Vid. Fairs and Markets.

How far trespass lies for hunting and
pursuing game 390

Vid. Game.

Trespass will not lie against a mere
ministerial officer for what is done in
pursuance of his duty 399

Trespass will not lie for taking an ex-
cessive distress 400

Trespass will not lie for driving a dis-
tress out of the county, or impound-
ing it in different places *ib.*

In what case trespass lies against lessee
for cutting trees *ib.*

Trespass will not lie for going on the
lands adjoining to highways if they
are impassable 401

Aliter of a private way *ib.*

Trespass will not lie for taking an
estray *ib.*

Nor for taking a ship and goods as
prize *ib.*

Trespass is a local action, and cannot
be maintained for breaking and en-
tering an house in a foreign country
402

An interest in the soil is not necessary
to maintain trespass *ib.*

Possession is sufficient 403

A special property is also sufficient *ib.*

Churchwardens may have trespass for
taking the goods of the church *ib.*

In what cases of trespass baron and
feme should join 404

Tenants in common should join *ib.*

Before entry and possession, trespass
cannot be maintained *ib.*

Vid. Declaration; and for trespass on
the case, *vide Case.*

In

- In trespass for the mesne profits in
ejectment, how much plaintiff may
recover *page* 494
- Either the nominal plaintiff or real
lessee in ejectment may have trespass
for the mesne profits 495
- When the action is brought against the
tenant in possession, what must be
proved *ib.*
- Money in such case cannot be paid
into court 496
- Trover.*
- Trover will not lie for an irregular
distress 381
- Trover lies to try the validity of sales
538
- Vid. Sales.*
- Trover lies to recover instruments con-
veying a chose in action 542
- Will not lie for goods condemned by
a court of competent jurisdiction 543
- Unless the jurisdiction is limited *ib.*
- Possession alone gives a good title in
trover 575
- But the action may be maintained
without possession 576
- But if there is neither actual possession
nor right of actual possession, trover
will not lie *ib.*
- Property in the plaintiff is indispen-
sably necessary *ib.*
- Will not lie where there has been an
exchange and possession delivered
ib.
- What will transfer the property 577
- Trover will lie on a special property
557
- Any person who is in possession of the
goods of another is liable to trover,
except in case of a sale in market
overt, or other fair transfer 579
- What shall be deemed such fair trans-
fer *ib.*
- Where the taking has been tortious,
it is not necessary to shew in evidence
an actual conversion to party's own
use 580
- Where the taking has not been torti-
ous, an actual conversion must be
proved *ib.*
- Where a person intrusted with goods
puts them into the hands of a person
contrary to the directions of the
owner, it is a conversion 581
- Trover lies for the partial user or con-
version of another's goods *page* 581
- Where the law gives a lien, trover will
not lie
- Vid. Executor and Administrator, Lien.*
- Trover will lie for goods delivered to a
servant 582
- One tenant in common, joint-tenant,
or parcener, cannot have trover
against the others 586
- Trover will not lie against executors
or administrators for a conversion in
testator's lifetime 587
- Will lie against baron and feme *ib.*
- Vid. Declaration and Plea.*
- In what cases an actual conversion must
be proved 589
- In what cases of trover things may be
brought into court 596
- The defendant in trover may be held
to special bail *ib.*
- The judgment in trover must be always
for damages *ib.*
- Vid. Evidence.*
- Trusts.*
- That a bond has been given in trust
is now pleadable to debt on a bond
222
- Where an injury has arisen from a
breach of trust, case lies for it 650
- Trustee.*
- Trustees holding over after the deter-
mination of their interests, are tres-
passers 399
- In ejectment by *cestui que trust*, what is
proof of possession 433
- Trustees in a marriage-settlement must
make an entry to avoid a fine 450
- Cestui que trust* will not be admitted
to defend in ejectment; *aliter* of a
devisee in trust 453
- A naked trust shall not exclude a man
as a witness 704
- U
- Use and Occupation.*
- Rent, how recoverable in an action
for use and occupation 20
- Assumpsit*

Assumpsit for use and occupation lies only where the defendant holds by permission, or demise of plaintiff, and in such case defendant will not be allowed to question plaintiff's title *page 20*

Therefore will not lie where the possession has been adverse or tortious *20*

But he may give evidence to explain the nature of the holding *21*

Will not lie where the premises have been let for an unlawful purpose *21*

The occupation must be such as the party contracted for with a view to its being for his benefit *ib.*

A proportionable part of the rent due to tenant for life is recoverable *21*

So a proportionable part of rent due to tenant in tail may be recovered by his executor *22*

Tenant at will who demises to another, may have assumpsit for use and occupation *ib.*

To an action for use and occupation, *nil habuit in tenementis* is a bad plea *165*

Usury.

Bill of exchange given for usurious consideration, void *27*

Bonds whose consideration is usurious are void *175*

What agreements are usurious *176*

What are not usurious *177*

Vid. Bond, Annuity.

How far the borrower of money usuriously lent may be a witness *711*

V

Variance.

Vid. Evidence, Record.

Venue.

The court will not change the venue in debt, except under particular circumstances *211*

Where it must be laid in debt for rent against lessee *212*

Where against the assignee *ib.*

Where in debt for an amercement *115*

Where in an action against an executor or administrator *217*

Where to lay the venue in covenant *304*

The venue in actions against justices of the peace, constables, &c. must be laid in the proper county *338*

In declaring for an escape the venue may be laid where the party was seen at large *page 653*

In what cases the court will change the venue in an action of slander *516*

Verdict.

How far the verdict in assumpsit should follow the issue *168*

Plaintiff may recover less than he goes for, but cannot recover more *169*

The jury may find less in damages than are proved *ib.*

The verdict in debt may give damages beyond the penalty of the bond *262*

How the verdict must be found in debt for a specific sum *263*

If the jury in an action against an executor find assets, they should find the value *ib.*

What verdict is good in covenant *310*

Verdict in assault may find the defendant guilty at a different day and place than laid by the plaintiff *321*

Plaintiff can recover damages but once *ib.*

If there are many defendants, the jury may find some guilty, and others not guilty *322*

The verdict in an action of false imprisonment can only give damages to the time of the action brought *340*

Vid. Damages.

In actions of trespass the jury may find a verdict variant from the declaration *420*

Vid. Costs and Damages.

Verdict in ejectment shall be according to the plaintiff's title *490*

The verdict may be good for part of what the plaintiff went for *ib.*

When lands are recovered by verdict in ejectment, all buildings, &c. shall be recovered *491*

In actions of slander, though all the words in one count are not actionable, yet if any actionable are proved, there shall be a verdict accordingly *523*

In what cases of a general verdict, if any of the counts are for words not actionable, shall there be a *venire facias de novo* granted *ib.*

How far verdicts are evidence *735*

Where

Where between other parties *page* 735,
738

A verdict is only evidence of what was
in issue in the former cause 737

Exception in case of tolls, commons,
&c. *ib.*

Verdicts, how given in evidence 750

Where some defendants suffer judgment
by default and others plead,
plaintiff must have a verdict against
those who suffered judgment 168

Vestry.

Case lies by a parishioner for excluding
him from the vestry room 650

Vestura Terræ.

He who has *vestura terræ* may maintain
an action of trespass 402

Viâualler.

Under what circumstances of selling he
may be a bankrupt 548

Void and Voidable Instruments.

No subsequent promise can set up a security
which was void in its creation 5

Volenti non fit Injuria.

The doctrine that *volenti non fit injuria*
only holds where the party has a
freedom of exercising his will 4

W

Wager.

Wagers upon indifferent matters without
any interest in the parties, farther
than the wager itself are recoverable
in assumpsit unless prohibited by
particular acts of parliament

Wagers fairly won are recoverable in
assumpsit *ib.*

The event must be contingent *ib.*

Must not be founded on an immoral
or indecent transaction *ib.*

Nor a cover to an illegal one 18

Nor must it be inconsistent with the
sound policy of the state to support
it *ib.*

What wagers are illegal *ib.*

Wagers on gaming recoverable, in
what cases *page* 19

Though a wager be illegal the stakeholder
cannot justify holding the
money from either party on that account
ib.

Indebitatus assumpsit will not lie for a
wager, it must be a special assumpsit
ib.

Wager on the event of a cause does not
incapacitate a witness 704

Warrants.

If an assault is justified under a sheriff's
warrant, it need not be produced 314

So defendant should shew the court
from what court the writ issued on
which the warrant was founded 319

If an arrest be justified under a magistrate's
warrant, the warrant should
be shewn to be legal 334

The general printed warrant of a tax
collector not sufficient *ib.*

Warrant to arrest a person for non-payment
of servants wages is illegal *ib.*

General warrants are illegal 335

How far a constable shall justify under
a justice's warrant 338

A justice's warrant need not be under
seal 394

A general warrant by a secretary of
state is void, and trespass lies for entering
an house by virtue of it, and
seizing papers, &c. 398

Search warrants, what must be observed
in suing them out 399

The legality of them is justified by the
finding of the stolen goods *ib.*

Warranty.

Warranty on a sale or exchange is not
triable in an action for money had
and received 99

Vid. Sales.

Waste.

Case lies against lessee from preventing
him in reversion from coming on the
lands to see if waste has been done
650

Watercourse.

How an ejectment may be maintained
for a watercourse 428

If a person has a watercourse by prescription,
he cannot increase the
quantity 618

But

- But he may vary the uses of it, as
change the nature of the mill *p.* 638
- In declaring for disturbance of a water-
course, it should state it as an ancient
one 653
- Way.*
- Cafe lies for obstructing a private way
639
- How far usage shall give a right of
way 640
- Where a way is claimed by prescrip-
tion, how it may be destroyed *ib.*
- Will.*
- How a will is to be executed under the
statute of frauds 467
- Statute only extends to cases of estates
of inheritance *ib.*
- Not to copyhold estates *ib.*
- Extends to powers of appointing uses
and trusts 468
- Will executed in a foreign country must
be legally executed *ib.*
- The witnesses, how they must see the
testator or each other sign the will *ib.*
- Need not all be present together when
the will is executed 469
- Where the attestations are at different
times, what the testator must do *ib.*
- The instruments attested at different
times must appear to be the same *ib.*
- Sealing a will without signing, is not
sufficient 470
- Testator must see the witnesses sign *ib.*
- Subscribing the will in the same room
is not sufficient 471
- A person who derives a benefit under
the will is not a good witness 472
- Devises to such persons are void, and
they are made good witnesses by stat.
25 Geo. 2. *ib.*
- If a will devises lands for payment of
debts, creditors may be witnesses to
it *ib.*
- A person convicted of larceny is not a
good witness within the statute 473
- The execution of the will may be prov-
ed by one witness *ib.*
- If the witnesses deny the execution of
the will, contrary testimony is admis-
sible *ib.*
- The testimony of a witness should not
be admitted against his own signing
474
- The will of an infant is void, but may
be good if published after his full
age 475
- The day of the birth is exclusive *ib.*
- Vol. II.*
- By custom an infant may have a power
of devising *page* 475
- Idiots and lunatics cannot make a will
476
- How feme coverts may devise *ib.*
- Wills obtained by fraud or circumven-
tion are void *ib.*
- In ejectment by devisee against the
heir at law, he is not bound to call
all the subscribing witnesses *ib.*
- Joint-tenants cannot make a will 477
- Devises in mortmain are void *ib.*
- Devises to charitable uses, how to be
made under statute 9 Geo. 2. c. 36. *ib.*
- How wills can only be cancelled or re-
voked under the statute of frauds
478
- The cancelling must be done *animo re-
vocandi* *ib.*
- A subsequent will not duly executed,
cannot cancel a former valid one *ib.*
- If the revoking will is itself afterwards
cancelled, the first shall be revived
479
- Aliter* if the first will has been cancelled
ib.
- In what cases marriages and the birth
of a child shall amount to a revoca-
tion 480
- A deed made subsequent to a will of
lands, tho' an informal one, is an im-
plied revocation *ib.*
- Levying a fine or conveyance by deed
of an estate, shall be deemed a revo-
cation of a will *ib.*
- Aliter* if only leased or mortgaged *ib.*
- How far the taking of a different estate
is a revocation of a will *ib.*
- Witherman.*
- In what cases it shall issue, and how be
proceeded on 379
- Witness.*
- Vid. Bankrupt.*
- A factor may be a witness both for the
buyer and seller 142
- Husband or wife not a witness for or
against each other 143
- Exceptions to this *ib.*
- Captain of a ship an inadmissible wit-
ness to prove barratry, without a re-
lease 144
- Acceptor of a bill of exchange an ad-
missible witness to prove that he had
no effects in his hands at the time
the bill was drawn 146
- G g
- In

Where between other parties *page* 735,
738
A verdict is only evidence of what was
in issue in the former cause 737
Exception in case of tolls, commons,
&c. *ib.*
Verdicts, how given in evidence 750
Where some defendants suffer judg-
ment by default and others plead,
plaintiff must have a verdict against
those who suffered judgment 168

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Case lies by a parishioner for excluding
him from the vestry room 650

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tain an action of trespass 402

Viâualler.

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curity which was void in its crea-
tion 5

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freedom of exercising his will 4

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out any interest in the parties, far-
ther than the wager itself are reco-
verable in assumpsit unless prohi-
bited by particular acts of parliament

Wagers fairly won are recoverable in
assumpsit *ib.*
The event must be contingent *ib.*
Must not be founded on an immoral
or indecent transaction *ib.*
Nor a cover to an illegal one 18
Nor must it be inconsistent with the
sound policy of the state to support
it *ib.*
What wagers are illegal *ib.*

Wagers on gaming recoverable, in
what cases *page* 19

Though a wager be illegal the stake-
holder cannot justify holding the
money from either party on that ac-
count *ib.*

Indebitatus assumpsit will not lie for a
wager, it must be a special assumpsit
ib.

Wager on the event of a cause does not
incapacitate a witness 704

Warrants.

If an assault is justified under a sheriff's
warrant, it need not be produced 314

So defendant should shew the court
from what court the writ issued on
which the warrant was founded 319

If an arrest be justified under a magi-
strate's warrant, the warrant should
be shewn to be legal 334

The general printed warrant of a tax
collector not sufficient *ib.*

Warrant to arrest a person for non-pay-
ment of servants wages is illegal *ib.*

General warrants are illegal 335

How far a constable shall justify under
a justice's warrant 338

A justice's warrant need not be under
seal 394

A general warrant by a secretary of
state is void, and trespass lies for en-
tering an house by virtue of it, and
seizing papers, &c. 398

Search warrants, what must be ob-
served in suing them out 399

The legality of them is justified by the
finding of the stolen goods *ib.*

Warranty.

Warranty on a sale or exchange is not
triable in an action for money had
and received 99

*Vid. Sales.**Waste.*

Case lies against lessee from preventing
him in reversion from coming on the
lands to see if waste has been done
650

Watercourse.

How an ejectment may be maintained
for a watercourse 428

If a person has a watercourse by pre-
scription, he cannot increase the
quantity 618

But

But he may vary the uses of it, as
change the nature of the mill *p.* 638
In declaring for disturbance of a water-
course, it should state it as an ancient
one 653

Way.

Cafe lies for obstructing a private way 639
How far usage shall give a right of
way 640
Where a way is claimed by prescrip-
tion, how it may be destroyed *ib.*

Will.

How a will is to be executed under the
statute of frauds 467
Statute only extends to cafes of estates
of inheritance *ib.*
Not to copyhold estates *ib.*
Extends to powers of appointing uses
and trusts 468
Will executed in a foreign country must
be legally executed *ib.*
The witnesses, how they must see the
testator or each other sign the will *ib.*
Need not all be present together when
the will is executed 469
Where the attestations are at different
times, what the testator must do *ib.*
The instruments attested at different
times must appear to be the same *ib.*
Sealing a will without signing, is not
sufficient 470
Testator must see the witnesses sign *ib.*
Subscribing the will in the same room
is not sufficient 471
A person who derives a benefit under
the will is not a good witness 472
Devises to such persons are void, and
they are made good witnesses by stat.
25 *Geo.* 2. *ib.*

If a will devises lands for payment of
debts, creditors may be witnesses to
it *ib.*

A person convicted of larceny is not a
good witness within the statute 473

The execution of the will may be prov-
ed by one witness *ib.*

If the witnesses deny the execution of
the will, contrary testimony is admis-
sible *ib.*

The testimony of a witness should not
be admitted against his own signing
474

The will of an infant is void, but may
be good if published after his full
age 475

The day of the birth is exclusive *ib.*

VOL. II.

By custom an infant may have a power
of devising *page* 475

Idiots and lunatics cannot make a will
476

How feme coverts may devise *ib.*

Wills obtained by fraud or circumven-
tion are void *ib.*

In ejectment by devisee against the
heir at law, he is not bound to call
all the subscribing witnesses *ib.*

Joint-tenants cannot make a will 477

Devises in mortmain are void *ib.*

Devises to charitable uses, how to be
made under statute 9 *Geo.* 2. c. 36. *ib.*

How wills can only be cancelled or re-
voked under the statute of frauds
478

The cancelling must be done *animo re-
vocandi* *ib.*

A subsequent will not duly executed,
cannot cancel a former valid one *ib.*

If the revoking will is itself afterwards
cancelled, the first shall be revived
479

Aliter if the first will has been cancelled
ib.

In what cases marriages and the birth
of a child shall amount to a revoca-
tion 480

A deed made subsequent to a will of
lands, tho' an informal one, is an im-
plied revocation *ib.*

Levying a fine or conveyance by deed
of an estate, shall be deemed a revoca-
tion of a will *ib.*

Aliter if only leased or mortgaged *ib.*

How far the taking of a different estate
is a revocation of a will *ib.*

Witherman.

In what cases it shall issue, and how be
proceeded on 379

*Witness.**Vid. Bankrupt.*

A factor may be a witness both for the
buyer and seller 142

Husband or wife not a witness for or
against each other 143

Exceptions to this *ib.*

Captain of a ship an inadmissible wit-
ness to prove barratry, without a re-
lease 144

Acceptor of a bill of exchange an ad-
missible witness to prove that he had
no effects in his hands at the time
the bill was drawn 146

G g

In

- In an action against the maker of a promissory note, the indorser is a good witness to prove it paid *p.* 168
- The subscribing witness to a bond must always be produced 257
- The obligor's confession not sufficient 258
- Where the subscribing witness to a bond cannot be had, collateral evidence is admissible *ib.*
- Where the witness is infamous or dead, how the bond is to be proved 259
- What the witness must prove *ib.*
- If a witness denies the execution of a deed, how it may be proved 258
- Where an executor pleads a judgment, & *ultra plene administravit*, and there is a replication of *per fraudem*, the party who has obtained that judgment is inadmissible to prove it to have been for a valuable consideration 261
- Where the question is respecting a demise from a particular person, and both parties admit his title, he is an admissible witness 309
- False imprisonment will not lie for arresting a witness returning from a trial 327
- In trespass against many, if one has nothing proved against him, he may be a witness for the rest 420
- The tenant in possession is an inadmissible witness in ejectment either to prove possession or any thing connected with it 488
- An executor is a competent witness to prove the testator's sanity 489
- An heir apparent may be a witness to prove a title, but not him in remainder *ib.*
- A clerk in the post-office, who was used to discover the forgery of franks, a good witness in ejectment to prove a hand forged 491
- But he shall not be allowed to judge from comparison of hands, without knowledge of the person's handwriting 489
- Neither a bankrupt nor his wife can be witnesses to prove an act of bankruptcy 591
- A creditor who had sold his chance of recovering his debt may be a witness 654
- So a creditor who releases to the assignees a good witness *ib.*
- A creditor is not a competent witness in actions to recover any part of the bankrupt's property *page* 592
- In what cases the bankrupt may be a witness *ib.*
- In an action for a rescue, the party rescued may be a witness 659
- Who may be witnesses 703
- What the strict objection on the ground of interest *ib.*
- It must be certain, a future and contingent interest not sufficient 704
- Trustee, how far admissible as a witness *ib.*
- How far the heir apparent or remainder-man *ib.*
- Co obligor in a bond to the ordinary, a good witness for the administrator *ib.*
- Executor a good witness to prove the testator's sanity *ib.*
- Executor in a subsequent will to prove a forgery 705
- Policies of insurance, how far one under-writer may be a witness for another *ib.*
- Persons who may ultimately be benefited, cannot be witnesses *ib.*
- Commoners, how far they may be witnesses for one another *ib.*
- Persons liable to be rated to the poor, witnesses on an appeal *ib.*
- Or in an action on a bond given by a collector of the parish rates *ib.*
- If a witness thinks himself interested, he is inadmissible 706
- What the nature of the interest must be which will disqualify a witness *ib.*
- No person who has signed a negotiable instrument can be a witness to impeach it 708
- But if he is at all events liable and uninterested in the immediate question, he may be a witness as between other parties *ib.*
- A person in whom a personal trust or confidence is reposed, is an inadmissible witness 709
- A person who claims property in the instrument sued upon is inadmissible even with a release *ib.*
- Plaintiff or defendant cannot be examined as witnesses for or against each other *ib.*
- In what cases one made a defendant with others may be a witness 710
- In

- In what cases a party interested may be a witness *page* 710
- What persons interested by statute are witnesses 712
- Persons admitted as witnesses from necessity 713
- So are persons from the usage of trade 714
- A person not incapacitated by his own act *ib.*
- If the interest is small or remote, it shall not incapacitate a witness 715
- Release restores the competency of a witness 716
- Attorney and counsel can be witnesses, in what cases 717
- This only extends to counsel and attorneys in a court, not to others, though confidentially and professionally employed 718
- An attorney or counsel is not only restricted from giving such evidence in an action against his client, but in all cases whatever 719
- But an attorney or counsel may be a witness to prove a hand-writing *ib.*
- Husband and wife, in what cases they can be witnesses 720
- Woman living with a man *as his wife*, may be a witness for him 722
- Parents and children may be witnesses for each other *ib.*
- How far their declarations are admissible to bastardize their issue 723
- What crimes incapacitate a witness *ib.*
- How far a pardon shall restore a witness 724
- How far a *particeps criminis* may be a witness 725
- How far religious tenets or principles incapacitate one from being a witness 726
- Infants *non compos*, &c. when they can be witnesses 727
- Witnesses now to be sworn *page* 728
- Quakers, how far witnesses *ib.*
- What questions may be asked a witness 729
- How far a witness may use memorandums 730
- Witness after being examined and cross-examined in chief, cannot be objected to for incompetence *ib.*
- Where a witness is dead, falls sick, or cannot be found, his depositions are evidence 755
- How far a witness's character may be impeached by general evidence 790
- Words.*
- Vid. Slander.*
- Wreck.*
- Lord may maintain trover before the year and day expired 577
- What shall be deemed wreck 594
- Writ.*
- Suing out a writ shall prevent the statute of limitations 125
- But the writ to prevent the statute must have been proceeded on 153
- A writ must be returnable the next term, or it is void 329
- False imprisonment lies where the arrest is on a void writ or process *ib.*
- Aliter* where the process is irregular *ib.*
- How far evidence 739
- How given in evidence *ib.*
- Vid. Sheriff.*
- Writ of possession in ejectment, how it shall issue 492

THE END.

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